91-1625

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

THE CAIN PARTNERSHIP, LTD.,
Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the 28 U.S.C. § 157(b)(3) congressional grant of jurisdiction, to a non-Article III bankruptcy judge, to determine whether it or an Article III district judge must adjudicate the merits of a proceeding, a violation of Article III of the Constitution?

2. Is a general delegation, pursuant to 28 U.S.C. § 157(b)(1), by an Article III judge of her/his jurisdiction to a non-Article III bankruptcy judge, with instruction to hear and determine a state law lease dispute, even though classifiable as a "core proceeding" under 28 U.S.C. § 157(b)(2)(A), (G) and (O), a violation of Article III of the Constitution?

3. If the answer to Question No. 2 is "yes," is it constitutionally possible for the non-Article III bankruptcy judge to obtain otherwise non-existent jurisdiction by consent of the parties?

4. If the answer to Question No. 3 is "yes," is it constitutionally possible for the consent [i.e., the consent envisioned by 28 U.S.C. § 157(c)(2)] to be implied only?

5. Is the filing by a landlord, in bankruptcy court, of a motion to lift the automatic stay in place because of 11 U.S.C. § 362(a), claiming that the debtor's assertion that the subject leasehold is "property" of the bankruptcy estate is false, an objection to federal (not just bankruptcy court) jurisdiction, since such federal jurisdiction extends only to the "property" of the debtor?

6. If the answer to Question No. 5 is "yes," is it constitutionally permissible for the objection so made, subsequently, to be deemed, for the first time, by the court of appeals, to have been waived by consent implied merely from the fact that the party aggrieved did not express in some additional way [other than a motion pursuant to *Federal Rules of Civil Procedure*, Rule 60(b)(4) after an

appeal was pending but before consideration by the court of appeals] an objection to jurisdiction?

7. After a bankruptcy court rules that a "proceeding" is "core" and a district court, on appeal, affirms, is the court of appeals free, for the first time, to declare that the "proceeding" was "non-core" yet affirm the judgment below (on a finding of implied consent) even though the appellant was never given the opportunity to make elections and motions which would have presented themselves in the bankruptcy court had the "non-core" ruling emanated from the bankruptcy court as anticipated by 28 U.S.C. § 157(c)(2)?

8. Has a "taking" of real property, in violation of the Fifth Amendment to the Constitution, occurred when a non-Article III bankruptcy judge (in response to a motion by the owner challenging the right of a bankrupt tenant to continue in possession), fails, for a period greater than is required to provide reasonable notice of hearing on said motion, to lift the automatic stay, which keeps the owner from his property, in order to make possible an adjudication of the owner's claim by a tribunal presided over by a non-Article III judge?

PARTIES*

The Cain Partnership, Ltd., petitioner, has no parent or subsidiary company, and has no knowledge of parent companies or subsidiaries of respondents, Pioneer Investment Services Co., Fleet National Bank, First National Bank of Louisville. The parent company of First Tennessee Bank National Association, upon information and belief, is First Tennessee National Corporation.

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* Since the constitutionality of an Act of Congress is drawn in question by this petition, 28 U.S.C. § 2403(a) may be applicable; upon information and belief, certification of this fact, pursuant to 28 U.S.C. § 2403(a), to the Attorney General has not been made.

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[2] D.C. — U.S. District Court for the Eastern District of Tennessee, Northern Division.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, The Cain Partnership, Ltd. ("Cain") respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINIONS BELOW

The Amended Opinion of the United States Court of Appeals for the Sixth Circuit in Case Nos. 90-5766/6578 (App.Z), although recommended for full text publication, appears to be reported only unofficially at this time as *The Cain Partnership, Ltd.* v. *Pioneer Investment Services Company*,

at Bankr. L. Rep. (CCH) ¶ 74,312, (6th Cir. 1991), *amending* 946 F.2d 445, 22 Bankr. Ct. Dec. (CRR) 118 (opinion withdrawn) (App. V). The Sixth Circuit opinion denying rehearing is reported unofficially at 1991 U.S. App. LEXIS 31363 (6th Cir. 1991) (App. BB). All other opinions and orders appear to be unreported.

JURISDICTION

The Amended Judgment of the Sixth Circuit was filed October 28, 1991. (App. AA). A petition for rehearing, with a suggestion for a rehearing en banc, was denied on December 19, 1991 (App. BB). This Court on March 2, 1992, entered an order extending the time for filing a petition for writ of certiorari until April 7, 1992 (App.DD). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III, § 1, set forth in App. EE.
U.S. Const. amend V and X, set forth in App. EE.
28 U.S.C. § 1334(a)-(d), set forth in App. EE.
28 U.S.C. § 157(b)(1)-(4), and (c), set forth in App. EE.

I. STATEMENT OF THE CASE

A. INTRODUCTION.

As more specifically set forth in § I.B., the bankruptcy judge below assumed jurisdiction over Cain's property and adjudicated, as a "core proceeding," a dispute as to whether state law had terminated the debtor's lease of the property. The district court affirmed on appeal. The Sixth Circuit, in the face of a constitutional challenge by Cain to the jurisdiction of the non-Article III bankruptcy judge, ruled that the dictates of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) prohibited the proceeding from being classified as "core," but transformed the "proceeding" after the fact into a "non-core" proceeding and conferred jurisdiction on the bankruptcy judge by implying Cain's consent pursuant to 28 U.S.C. § 157(c)(2).

This case raises the important federal question following this Court's decision in *Northern Pipeline:* Did the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA") cure the constitutional defects in the jurisdictional provisions of the Bankruptcy Reform Act of 1978 (the "Reform Act") which this Court declared unconstitutional in *Northern Pipeline*? Respectfully, this issue alone would justify granting this petititon; but there is more, making this case particularly appropriate for review.

By finding that jurisdiction existed in the bankruptcy court below, the Sixth Circuit did decide federal questions in conflict with this Court's decisions and implicitly decided important issues which have not been settled by this Court. Nevertheless, it is the reasoning of the Sixth Circuit in conflict with other circuits on the issue of whether "consent" under 28 U.S.C. § 157(c)(2) may be implied, as well as a manipulation of the record on appeal to find consent, which represents a departure from the accepted and usual course of judicial proceedings, which stand out as the most obvious reasons for granting this petition.

This Court spoke strongly once before on the limits of the jurisdiction of a non-Article III bankruptcy judge, in *Northern Pipeline*, although without the unity which would have provided clearer guidance. Congress, rather than making bankruptcy judges Article III judges, enacted BAFJA, which, rather than limiting bankruptcy jurisdiction, may have expanded it. The Court is urged to speak again.

B. STATEMENT OF THE FACTS

This litigation began with a lease dispute between Cain and Pioneer Investment Services Company, the debtor-in-possession ("Pioneer"), which erupted in bankruptcy court when Pioneer listed an interest in Cain's property, a large tract of commercial real estate in Knoxville, Tennessee, worth in excess of twenty million dollars (the "Property"),[1] as an asset to be used in its reorganization pursuant to 11 U.S.C. § 101 *et seq*. Pioneer claimed a right to use of the major portion of the Property pursuant to a leasehold interest which had been conveyed to Pioneer.[2]

Cain is lessor of the Property and has been for years prior to this litigation. The Property was leased years earlier to Colonial Enterprises, Inc. ("Colonial"). That leasehold ("Colonial Lease" or "head lease") covered approximately 95.5 acres which was later reduced to 93.85 acres. Pioneer obtained an interest as an undertenant through another undertenant of Colonial, Permiere Investment Properties, Inc. ("Premiere").[3] Pioneer subleased the Property further.

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[1] Cain was treated for all purposes below as the owner of the Property (See App. D, p. 35a.).

[2] The precise nature of the interest was one of the many issues disputed by Cain and is immaterial for purposes of this petition, since this petition does not deal with the substantive issues of state contract and real property law out of which the rights adjudicated below were created, but to the subject matter jurisdiction of the non-Article III bankruptcy judge.

[3] The word "undertenant" is a term borrowed from the authorities which were material to the resolution of the lease dispute below (see footnote 6, *infra*, p. 5).

Prior to Pioneer obtaining an interest, Colonial had carved out and conveyed an interest in a 5.71 acre tract subject to the head lease to Omie, Inc., who conveyed it to Orange Tee.[4]

Prior to the filing of the petition, the Colonial Lease was terminally breached by Pioneer's failure to pay property taxes on numerous occasions and by Orange Tee's unlawful activities.[5] A dispute arose when Cain refused to issue an estoppel certificate to Pioneer, and, on April 12, 1989, Pioneer filed its petition for reorganization under Chapter 11. On May 25, 1989, Pioneer listed an interest pursuant to the Colonial Lease on an Amended Schedule of Assets.

Faced with the automatic stay that stays the commencement of an action against the debtor [11 U.S.C. § 362(a)(1)] and prohibits "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate" [11 U.S.C. § 362 (a)(3)], that same day, Cain filed a motion to lift the stay. Cain did *not* file a claim against the estate but challenged Pioneer's depiction of the estate itself.

In response to Pioneer's assertion of an intersest under the Colonial Lease, Cain argued that, in accordance with the common law of Tennessee, the Colonial Lease had terminated pre-petition through Pioneer's own breaches and the unlawful use by Orange Tee, in breach of indivisible covenants of the head lease, resulting in termination of all subordinate interests, including Pioneer's, which is the law in Tennessee adopted from the common law of England via the Tennessee Constitution.[6] Cain argued that the interest

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[4] There were other conveyances at issue below and many issues regarding the terms thereof. Over thirty possible state common law contract and real property issues were identified, *see App. A*, affecting creation of the material relationships, but the above sufficiently summarizes the material relationships for purposes of this petition.

[5] These were Cain's contentions, which were disputed by Pioneer.

[6] See *Jay* v. *Bennett*, 21 N.Y. Sup. Ct. Rpt. 63, 14 Hunley 8 (1878); *Brett* v. *Cumberland*, 79 Eng. Rept. (Full Reprint) 445, Croke and Jac. 522

claimed by Pioneer was not property of the estate and sought to lift the stay to regain its property. Pioneer took an adverse position with respect to termination, and, therefore, upon the filing of the motion to lift the stay, Cain was forced to litigate the lease termination dispute before a bankruptcy judge, and what followed is the subject of this case.[7]

The issue before the bankruptcy judge was whether the property interest claimed by Pioneer was "property of the estate."A fundamental basis for federal jurisdiction in a bankruptcy case is the exclusive jurisdiction in the district court over debtor's property. 28 U.S.C. § 1334(d). If the interest claimed by Pioneer terminated pre-petition, then, there was nothing of Cain's in the estate other than, at most, a "tenancy-at-sufferance."

From the moment Pioneer scheduled an interest in the Property, Cain overtly challenged the basis for jurisdiction over Pioneer's claim, and the bankruptcy judge understood Cain's position as a frontal assault to the court's jurisdiction (*See* App. P and O). Nevertheless, the bankruptcy judge entered an express ruling that the proceeding was a "core proceeding" under 28 U.S.C. §§ 157 (b)(2)(A), i.e., "matters concerning administration of the estate;" (G),[8] i.e., "motions

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(1654); *Webber* v. *Smith*, 2 Vern. 103 [1] Eq.Ca.Ab. 115, pl.14 S.C. (1689); *Norton* v. *Acklane*, 79 Eng. Rept. 1097, Croke and Car. 580 (1654); *Bachelour* v. *Gage*, 79 Eng. Rept. 768, Croke Car. 188 (1684); 51 *C.J.S.* § 46 p.138, § 47 p.140, § 48(1) pp.140-142; 49 *Am.Jur.2d*, Landlord and Tenant § 508-§ 512 pp.487-491; 1 *Friedman on Leases* (2nd ed. 1983) § 7.703 pp.329-330; 1 *Tiffany On Real Property* (3rd ed. 1939) § 153 p.247; Cribbet, *Principles of the Law of Real Property* (2nd ed. 1975) pp.220-221; 2 *Powell On Real Property* (1990 ed.) ¶222[7][d] pp.16-84 through 16-85; *Walgreen Co.* v. *Walton*, 64 S.W.2d 44, 48 (Tenn.App. 1932), *cert. den.* July 19, 1933; *Anderson* v. *Miller*, 96 Tenn. 34 (1896).

[7] A motion by Pioneer to assume the lease was also before the court, the resolution of which was necessarily dependent upon resolution of the stay motion.

[8] The Sixth Circuit unexplainably substituted 28 U.S.C. § 157(b)(2)(E)

to terminate, annul, or modify the automatic stay;" and (O), i.e., "other proceedings affecting the liquidation of the assets of the estate. . . ."

Cain was not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was "core" or "non-core," or with respect to consent. In fact, the first indication of the bankruptcy judge's view with respect to the nature of the proceeding was in the memorandum opinion adjudicating the lease dispute (App. B, p. 9a), entered months after Cain filed its motion to lift the stay.

The litigation below culminated with the final order adjudicating that the Colonial Lease had not terminated prepetition under Tennessee law (App. C). There was no federal rule of decision and the sole basis for adjudication by the bankruptcy court was that Pioneer had filed schedules in bankruptcy, listing an interest in Cain's Property as an asset of its estate (App. Z, p. 113a). In the face of the automatic stay, Cain had no choice but to seek relief in bankruptcy or risk contempt of court for violating the automatic stay. The bankruptcy court heard and determined the lease controversy in accordance with 28 U.S.C. § 157(b)(1) and ruled in Pioneer's favor (App. B). Cain appealed pursuant to 28 U.S.C. § 158 to the district court, and the district court affirmed on March 8, 1990 (App. E). A motion to amend the judgment was denied by the district court on May 23, 1990. (App. G).

The appeal to the Sixth Circuit was docketed as Case No. 90-5766. While that appeal was pending, Cain, upon researching in response to positions being asserted by opposing parties, was enlightened more fully with respect to the

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for § 157(b)(2)(G) (*See* App. Z, p. 112a). Cain pointed this out, but the Sixth Circuit chose not to address the issue.

jurisdictional significance of the adjudication below, which led to *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33 (1989), decided after the bankruptcy court's disposition of Cain's motion,[9] which was the first hint of the Supreme Court's views of the jurisidictional scheme under BAFJA.

Cain filed motions, pursuant to *Fed.R.Civ.P.*, Rules 60(b)(4) and 12(h)(3), in the bankruptcy court and the district court, seeking vacation of both courts' orders for lack of subject matter jurisdiction. During a hearing on Cain's motion, the banktruptcy judge expressed frustration because of the judge's view that jurisdiction had always been the issue (*see* App. O and P). The judge reaffirmed that he did possess jurisdiction and denied the motion (App. I and H). That order was appealed to the district court where it was held in abeyance until denied (App. CC). The motion in the district court was also denied (App. K), and this order was appealed to the Sixth Circuit and docketed as Case No. 90-6578 and consolidated with Case No. 90-5766 (*see* App. M); in its opinion, the district court acknowledged the jurisdictional issue below and affirmed the ruling below that the proceeding was "core." (App. J., pp. 69a-71a).

On appeal to the Sixth Circuit,[10] Cain challenged the jurisdiction of the bankruptcy judge over the lease dispute notwithstanding that the proceeding was a "core proceeding" under the language of § 157(b)(2)(A), (G) and (O).[11] Pioneer

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[9] This Court's reasoning on the timing of raising Art. III issues in *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985) is pertinent. In *Thomas*, the Art. III challenge by Stauffer Chemical was not raised until, in a separate lawsuit after the challenged adjudication concluded, and not even in the lawsuit until after *Northern Pipeline* was decided.

[10] Since Case No. 90-6578 challenges the subject matter jurisdiction of the bankruptcy court in Case No. 90-5766, and a reversal of the former would necessarily result in reversal of the latter, review is sought as to both.

[11] Cain also argued that this Court's decision in *Cline* v. *Kaplan*, 323 U.S. 97 (1944), as well as a Sixth Circuit case, *In re: F&T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983), required reversal of the court below because

argued "non-core" consent principles which seemed specious since there was no ruling below that the proceeding was "non-core."[12] Pioneer cited neither *Northern Pipeline* nor Article III.

The Sixth Circuit agreed that *Northern Pipeline* required a "strict reading" of "core" (App. Z, p. 112a,n.2), reasoning that "[s]ignificant jurisdictional consequences flow from this distinction [between "core" and "non-core"]." (App. Z, p. 113a) The Sixth Circuit thus acknowledged that the adjudication by the bankruptcy judge of the lease dispute as a "core proceeding" conflicted with *Northern Pipeline*, as reflected in its statement at App. Z, n.3, p. 113a:

> Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the questions as to the automatic termination of the lease upon

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of the dispute over Pioneer's claimed interest. The Sixth Circuit ignored the argument altogether. Cain suggests that the principles in those cases are implicitly based on constitutional principles and are particularly applicable in this case.

[12] Pioneer also argued that Cain expressly consented to jurisdiction in the pre-argument cover sheet to Case No. 90-5766 which goes to the conference attorney to facilitate administration and possible settlement. The statement was: ". . . *to appellant's knowledge*, there are no issues with respect to jurisdiction." The cover sheet is filled out with its purposes in mind, and is not intended to incorporate the positions of the parties. As stated above, *infra* at p.9, at the time of the docketing of the first appeal, Cain's knowledge regarding the Article III issue was limited. This Court had not decided *Granfinanciera* until sometime after the proceeding began, and had not even hinted that the jurisdictional provisions of BAFJA may also be suspect under Article III. The Sixth Circuit was, at first, persuaded and cited the statement as a basis for its first opinion that Cain had "impliedly or expressly consented." But, without detailing the history that followed, the Sixth Circuit acting without the need for a formal motion, subsequently rejected that basis for its decision, recalled the mandate (App. X), and amended its opinion accordingly (App. Y and Z). Reliance upon civil cover sheets compromises the advice of the conference attorneys to parties regarding their significance, especially since there is no provision for amendment.

> breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

The Sixth Circuit, instead of resolving the conflict, bypassed it by analyzing the proceeding below as if it had been ruled "non-core." The Sixth Circuit said nothing futher about the actual ruling as below, and ruled as follows, App. Z, p. 114a:

> The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine *the instant non-core proceeding.* (emphasis added).

Again, the Sixth Circuit held, *id.* at p. 115a:

> Under these circumstances, we conclude that the Partnership implicitly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine *this non-core but related proceeding.* (emphasis added)

Finding consent, the Sixth Circuit affirmed the denial of the Rule 60(b)(4) motion, reached the state law issues and affirmed the district court's decision. Cain's petition for rehearing with a suggestion for a rehearing en banc, raising the issues identified by this petition, was denied (App. Z).

II. REASONS FOR GRANTING WRIT OF CERTIORARI

The more obvious reasons for granting this petition are the conflict with other circuits on the issue of whether consent under 28 U.S.C. § 157(c)(2) may be implied, and the way in which the Sixth Circuit manipulated the record on appeal to find consent. These reasons, however, mask the more fundamental error of the Sixth Circuit in failing to follow through with the necessary result of its reasoning which will, therefore, be addressed first.

A. THE SIXTH CIRCUIT DECIDED AN IMPORTANT FEDERAL QUESTION IN CONFLICT WITH DECISIONS OF THIS COURT AND IMPORTANT ISSUES OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Sixth Circuit correctly reasoned that the bankruptcy judge below could not, consistent with *Northern Pipeline*, enter a final order in Cain's lease dispute, notwithstanding that it arose in a "core proceeding." The Sixth Circuit stopped short, however, of the necessary result of its reasoning and failed to declare the jurisdictional grant to bankruptcy judges unconstitutional as violating Article III. Although the reasoning of this Court in *Granfinanciera* suggests that BAFJA may be defective in light of *Northern Pipeline*, the Court did not have occasion therein to so hold. This case presents that occasion.

The words of Article III are simple enough:

> The judicial Power of the United States, shall be vested in one supreme Court, an in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III guarantees that the judicial power of the United States be exercised only by Judges with life tenure and irreducible compensation. *Northern Pipeline*, 458 U.S. at 57.

Counseled by their own experiences of oppression at the hands of unrestrained authority, the Framers determined never again to be subject to a system of government in which power was centralized without accountability, as indicated by the following statement in *Northern Pipeline*, *id.*:

> Basic to the constitutional structure established by the Framers was the recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elected, may justly be pronounced the very definition of tyranny."

The Framers, therefore, separated government into the three branches — legislative, executive and judiciary — and constitutionally secured the outside limits on the power of each. No doubt such restraint would encumber the exercise of governmental power, but the Framers chose to sacrifice convenience in exchange for a guarantee of liberty.

One of the rudimentary checks and balances was the independence of the judiciary. *Id.* at 58. It was so crucial for those in whom judicial power would be vested to be free from influence that the Framers guaranteed independence by constitutionally mandating that those judges not be subject to removal easily or salary reduction, throughout their lifetime. Appreciation for the convictions that compelled the Framers to guarantee permanent restraints on the delegation of power and for their salutary effects to this day, may have waned by the remoteness in time of the events that forged those convictions; but, fortunately, the language of the Constitution has not.

Article III specifically guarantees that no branch but the judiciary will exercise judicial power and precludes the transfer of judical power to a non-Article III decision-maker by an act of the legislature and alienation by the judicial

branch of its own powers. *Peretz* v. *United States*, 501 U.S. ____, 115 L.Ed.2d 808, 835, 111 S.Ct. 2661 (1991) (Scalia, J., dissenting). The interests served by Article III are "structural" and of subject matter jurisdictional significance. *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833, 850 (1986); *Freytag* v. *Commissioner*, 501 U.S. ____, 115 L.Ed.2d 764, 111 S.Ct. 2631 (1991) (Scalia, J., concurring). The litigants cannot be expected to protect them, and issues of consent or waiver are immaterial. *Schor*, 478 U.S. at 851. The independent judiciary must be jealously guarded. *Northern Pipeline*, 458 U.S. at 60. It is in this light that the evolution of bankruptcy jurisdiction must be examined.

The Bankruptcy Act of 1898 (the "Act") was unsatisfactory because of its limited jurisdictional reach, and the Reform Act was an effort to expand that jurisdiction (See *1 Collier on Bankruptcy*, ¶ 3.01[a]). Thus, bankruptcy judges were delegated all of the power of the district court over proceedings in bankruptcy, under former 28 U.S.C. §§ 1471-1482. Bankruptcy judges were empowered to adjudicate traditional state law claims related to the bankruptcy subject only to traditional appellate review in the district courts. That broad jurisdictional grant was declared unconstitutional in *Northern Pipeline*.

A plurality of Justices, in *Northern Pipeline*, reasoned that "matters from their nature subject to a suit at common law or in equity or admiralty" or "state-created private rights," 458 U.S. at 71, lie at the "protected core" of Article III judicial power. 458 U.S. at 70, n.25. Therefore, the final adjudication of contract disputes arising out of state law could not be delegated to a decision-maker lacking the attributes of Article III such as a bankruptcy judge.

A majority concurred in the judgment, but the concurring Justices did not adopt the plurality's analysis reasoning as follows, *id.* at 91:

> None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be sub-

> jected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How 272, 15 L.Ed. 372 (1856), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

Viewing appellate review by the district court as insufficient to save the Reform Act's grant of authority to the bankruptcy court to resolve "all matters of fact and law . . . in the first instance," the concurring Justices stated, *id.*:

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Article III of the United States Constitution.

More recently a majority of the Court, in *Granfinanciera*, 492 U.S. at 55-56, cited the following reasoning of the plurality in *Northern Pipeline* with approval:

> In *Northern Pipeline Construction Co.*, 458 U.S. at 71, the plurality noted that the restructuring of debtor-creditor relations in bankruptcy "may well be a 'public right,' " n.11 But the plurality also emphasized that state-law causes of action for breach of contract or warranty are paradigmatic private rights, even when asserted by an insolvent corporation in the midst of Chapter 11 reorganization proceedings. The plurality further said that "matters from their nature subject to 'a suit at common law or in equity or admiralty' " lie at the "protected core" of Article III judicial power, id., at 71, n 25, 73 L.Ed.2d 598, 102 S.Ct. 2858; see id., at 90, 73 L.Ed.2d 598, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment) — a point we reaffirmed in *Thomas*, *supra*, at 598, 87

> L.Ed. 409, 105 S.Ct. 3325. There can be little doubt that fraudulent conveyance actions by bankruptcy trustees — suits which, we said in *Schoenthal* v. *Irving Trust Co.*, 287 U.S., at 94-95, 77 L.Ed.2d 185, 53 S.Ct. 50 (citation omitted), "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it" — are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. See Gibson 1022-1025. They therefore appear matters of private rather than public right.

There is, therefore, one clear theme that enjoys the support of a majority of the Court; that is, there is a "protected core" of Article III judicial power into which a non-Article III bankruptcy judge is not permitted to venture. It is that Article III "core" against which BAFJA must be measured.

It took more than two years for Congress to enact legislation in response to *Northern Pipeline*. While Congress debated, bankruptcy proceedings were adjudicated in accordance with an Emergency Rule.[13] Proposals in the House of Representatives that would have solved the problem by conforming bankruptcy judges to Article III were strenuously opposed, *see* Countryman, *infra*, n.18, at p.29, and the final solution of Congress was BAFJA.

BAFJA, like former §§ 1471(a) and (b), grants original and exclusive jurisdiction over all title 11 cases to the district courts and original, but not exclusive, jurisdiction over all civil proceedings arising in or related to a case. 28 U.S.C.

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[13] The Director of the Administrative Office of the United States Courts adopted the Emergency Rule pending congressional response. *See* Countryman, *Scrambling to Define Bankruptcy Jurisdiction: The Chief Judicial Conference and The Legislative Process*, 22 Harv. J. on Legis. 1, 2 (1985). The Emergency Rule was the precursor to BAFJA.

§ 1334(a) and (b). Previous § 1471(c) was declared unconstitutional in *Northern Pipeline*, and there is no mirror image of § 1471(c) in § 1334.

Section 1334(c)(2) specifically requires abstention in a proceeding based upon state law claims. Section 1334(d) is particularly applicable in this case, and gives the district court exclusive jurisdiction over the debtor's property upon the filing of a petition. These sections will be addressed more particularly below.

The jurisdiction of bankruptcy judges under BAFJA is in 28 U.S.C. § 157, entitled "Procedures;" § 157(a) authorizes district courts to refer cases and proceedings arising under title 11 or arising in or related to a case under title 11 to the bankruptcy judges in their districts. The district court below exercised its authority to transfer all bankruptcy cases and proceedings to the bankruptcy court by a local rule, *Local Rules of the United States District Court for the Eastern District of Tennessee*, Rule 25.1.

The heart of BAFJA's jurisdictional scheme is in the difference between subsections (b) and (c) of § 157, which distinguish between "core" and "non-core" proceedings. From this distinction, as the Sixth Circuit correctly reasoned, "[s]ignificant jurisdictional consequences flow." App. Z, p. 112a. In fact, the distinction is crucial to the jurisdiction of the bankruptcy judge, for if the proceeding is "core," the bankruptcy judge must, given the general reference, "hear and determine" the proceeding and "enter appropriate orders and judgments," subject only to appellate review by the Article III district court under § 158. On the other hand, the bankruptcy judge, under § 157(c)(1), may only "hear" a "non-core" proceeding and submit proposed findings of fact and conclusions of law to the district court which, after "considering" the proposals, may enter a final order. If "*all*" parties to the proceeding "consent," "the *district court . . . may refer* a proceeding related to a case under title 11 *to a bankruptcy judge* to hear and determine. . . ." § 157(c)(2) (emphasis added). It is, therefore, of paramount importance

at the *outset* of every bankruptcy "proceeding" to know, for certain, whether it is a "core proceeding" or a "non-core proceeding."

The most crucial adjudication in each "proceeding," then, with respect to the issue of subject matter jurisdiction, has been mandated [§ 157(b)(3)] by Congress to be adjudicated, *not* by an Article III judge, but by a non-Article III bankruptcy judge: ("The bankruptcy judge *shall determine*, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11.") This is jurisdiction unlike any the bankruptcy judges have ever had under the Reform Act, and there are two constitutional defects inherent in this aspect of the scheme.

There is an Article III issue created by Congress assigning jurisdiction to a non-Article III judge to make the adjudication of whether the proceeding is "core" or "non-core," which determines the constitutionally permissible reach of his/her own jurisidiction in every case. A more classic exercise of judicial power is difficult to imagine.

The other constitutional defect, highlighting the first, is the vagueness of § 157(b)(1). One would expect, following *Northern Pipeline*, that Congress would at least, define "core," but this is not so. Section 157(b)(1) simply states:

> (b)(1) Bankruptcy judges may hear and determine . . . *all core proceedings* arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, . . . (emphasis added).

Section 157(b)(2) lists proceedings included within "core proceedings," but the list is expressly non-exhaustive (i.e., "Core proceedings include, but are not limited to —"). The only possible source of a definition of "core" is this Court's decision in *Northern Pipeline*, requiring analysis thereof by the bankruptcy judge in every proceeding, but this Court's opinions provide little help.

This Court has discussed the "core" of Article III at length but said very little on what is within the "core" of subject matter over which a non-Article III judge may exercise jurisdiction. The plurality opinion in *Northern Pipeline* indicates that a non-Article III judge may *only* enter final orders in cases involving "public rights." *Northern Pipeline*, 458 U.S. at 70. The Court may have shifted from the plurality's approach, *Schor*, 478 U.S. 853, but, in the bankruptcy context, the concept of "public rights" is still important because the word chosen by Congress, i.e., "core," to define bankruptcy jurisdiction was used by the Court only in its "public rights" analysis. *See* 458 U.S. at 70.

The only statement in *Northern Pipeline* regarding a "core" bankruptcy matter was "the restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power." *Id.* While the plurality stated that "[t]he former may well be a 'public right,' " the majority in *Granfinanciera* questioned whether the "restructuring of debtor-creditor relations is in fact a public right." 492 U.S. at 56, n.11. It is not even clear what is included within a "public right." The plurality in *Northern Pipeline* indicated that it was a right which "must at a minimum arise 'between the government and others.' " 458 U.S. at 69. That understanding, however, may have expanded to include a "private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary," *Thomas*, 473 U.S. at 593-594. *But see Granfinanciera*, 492 U.S. at 65-70, (Scalia, J., concurring).

A congressionally created right subject to a "complex regulatory scheme," may be a "public right," *see Thomas*, 473 U.S. at 593-594, and, perhaps, a closer "public rights" question is presented in the bankruptcy context concerning "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res," *Grandfinanciera*, 492 U.S. at 56. But, respectfully, if the Court is not settled on what is a "public right," and whether a "core" bankruptcy matter is or is not a

"public right," the non-Article III bankruptcy judge cannot be required to make the Constitutional analysis necessary to resolve such questions.

Congress' cure for the ills of jurisdiction in the bankruptcy context, dependent as it is upon whether a proceeding is "core," only makes matters worse. Since "core" is not defined, the bankruptcy judge must determine the limits of his or her jurisdiction by determining the limits of his or her jurisdiction. The tautology is obvious, and, therefore BAFJA is defective, not only for its grant of too much power to the bankruptcy judge, but, also, because it is too vague and violates the due process clause of the Fifth Amendment.

Even if "core" were defined, there remains the issue of whether the bankruptcy judge may adjudicate the proceeding measured against the "protected core of Article III." When the jurisdictional provisions of BAFJA are so measured, they must be struck down.

The bankruptcy judge below concluded that the proceeding was a "core proceeding" under the following categories of § 157(b)(2):

> (A) Matters concerning the administration of the estate;
>
> * * *
>
> (G) Motions to terminate, annul, or modify the automatic stay;
>
> * * *
>
> (O) Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

In contrast to the word "core" in § 157(b)(1), there is no ambiguity in the language of the specific *proceedings* listed in § 157(b)(2). The "catch-all" provisions of § 157(b)(2)(A) and (O) are remarkable in their breadth. *See* King, *Jurisdiction*

and Procedure Under the Bankruptcy Amendments of 1984, 38 Vand.L.Rev. 675, 688 (1985). It is difficult to conceive of any proceeding not within (A) or (O), or why any proceeding under the specific proceedings in (B) through (N) would not also be core proceedings under (A) and (O).[14] It appears that Congress has simply specified in (B) through (N) the various types of proceedings that come up in bankruptcy and, in (A) and (O), specifically assigned jurisdiction to the bankruptcy courts as pervasive as under § 1471(c), so that only the generality of bankruptcy jurisdiction, not its scope, has changed. *See* King, *id.*

The question for this Court is whether BAFJA grants more jurisdiction to bankruptcy courts than Article III permits. The most telling fact in response is that the claim in *Northern Pipeline* could even be adjudicated by the bankruptcy court as a core proceeding under (A) or (O). In fact, there is hardly a proceeding which would not fall within § 157(b)(2); yet, "core proceedings" are broader than that list. When the expansiveness of jurisdiction under § 157(b)(1) and (2) is broadened by the jurisdiction to determine whether proceedings are "core" or "non-core," plus the extra jurisdiction if the parties simply "consent" under § 157(c)(2), the violation of Article III is arguably more blatant in its specificity than under the general former provisions; yet, there is even more in this case.

Cain challenged Pioneer's asserted interest in the Property at the threshold of the bankruptcy case. If Pioneer's interest did not exist, as claimed, there would be no federal jurisdiction under 28 U.S.C. § 1334(d). Consequently, the non-Article III bankruptcy judge's adjudication determined not only whether the bankruptcy judge, but also whether the Article III district court, had jurisdiction. Therefore, if the ruling stands, upon the mere listing by the debtor of an interest in any property, whether Cain's real estate, the Taj Mahal or one of the Justices' leather chairs, federal jurisdiction

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[14] The Bankruptcy Court below determined that Cain's motion fell under (A), (G) and (O).

automatically attaches, a non-Article III judge is empowered by Congress to determine the constitutionality of his/her jurisdiction, state law *Northern Pipeline*-type disputes, as in the instant case, will continue to be finally adjudicated by non-Article III bankruptcy judges (who, *alone*, decide whether to so adjudicate), compelled by the automatic stay, and the teachings of *Northern Pipeline* are reduced to ashes.

Bankruptcy jurisdiction after BAFJA remains unsettled. The Sixth Circuit's reasoning indicates that § 157(b)(1) grants jurisdiction which Article III prohibits; but the Sixth Circuit failed to follow through. The Sixth Circuit decision reflects confusion, at best, but it is not alone. There are many unsettled points of law in BAFJA causing confusion primarily related to the vagueness of "core proceeding."[15] Courts diverge on almost every issue that can be framed under the jurisdictional provisions of BAFJA. The confusion is exemplified by the following quote from *In Re: Northwest Cinema Corp.* 49 B.R. 479, 481 (Bankrtcy D. Minn. 1985):

> Unfortunately there were so many opinions [in *Northern Pipeline*], I do not feel that I can determine from these opinions what the Supreme Court's reaction would be to the present statutory scheme.

The Court is urged to settle the issues raised herein.

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[15] Some courts speak of the § 157(b) as "defining" core proceedings. *See, Bankruptcy Desk Guide*, § 7:60, p.69 (Lawyers Coop. Pub. 1990) and cases cited therein. Others express the opposite view. *Id.* There is a split of authority on whether "core" is to be interpreted narrowly or broadly. Some courts reason that § 157(b)(2) should be tempered by this Court's decision in *Northern Pipeline*. *Id.* at 69. Other courts reason that Congress intended "core proceedings" to be broad. *Id.* at 70. The broad interpretation views BAFJA as a cure to the constitutional defects, *id.*, and the narrow interpretation views that BAFJA did not cure the constitutional defects so that it must be read narrowly to comport with the guidelines set forth in *Northern Pipeline*, *id.* Some courts hold that the "catch-all" provisions, § 157(b)(2), (A) and (O), are no broader than the specific proceedings listed in (B) through (N), *id.*, § 7:64 at 72. Some courts even reason that matters clearly within one of the specific provisions of § 157(b)(2) are "non-core" notwithstanding the congressional designation of them as "core," *id.*, § 7:66, at 74, while other courts abide strictly by the specific list in § 157(b)(2). *Id.*

B. REASONS FOR GRANTING WRIT IN CONNECTION WITH SIXTH CIRCUIT'S DECISION THAT JURISDICTION CONFERRED BY CONSENT

1. Holding That Consent Cures The Jurisdictional Defect Is In Conflict With Decisions Of This Court.

If Article III prohibits the bankruptcy judge below from adjudicating the lease dispute as a "core proceeding," then the parties cannot confer that jurisdiction. Congress provided that a bankruptcy court may "hear" "non-core" proceedings and make proposed findings and conclusions to the district court to enter the final order after "considering" the proposals. 28 U.S.C. § 157(c)(1).[16] The Sixth Circuit held that Cain consented under § 157(c)(2). Cain asserts that § 157(c)(2) violates Article III.

Stipulation by the parties does not create subject matter jurisdiction. *California* v. *LaRue*, 409 U.S. 109, 112 n.2 (1972). Article III preserves structural interests in the separation of powers between the respective branches, and the Court held as follows in *Schor*, 478 U.S. at 850:

> To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal court subject-matter jurisdiction beyond the limitations imposed by Article III, § 2. See, *e.g.*, *United*

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[16] There is an Article III issue in this scheme even before the issue of "consent" is reached under § 157(c)(2), even if the proceeding is "non-core." The Court in *Crowell* v. *Benson*, 285 U.S. 22 (1932) "endorsed the proposition that Congress possesses broad discretion to assign fact-finding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights." *Northern Pipeline*, 458 U.S. at 81 (Brennan, J.). But that reasoning falls without a congressionally created right. The voluntariness of the reference and control by an Article III court are also important factors. *See*, *Schor*, 478 U.S. at 855. In contrast, there is no voluntariness in this case. *See*, *Granfinanciera*, n.14, 492 U.S. at 59.

> *States* v. *Griffin*, 303 U.S. 226, 229, 82 L.Ed. 764, 58 S.Ct. 601 (1938). When these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests *that the parties cannot be expected to protect.* (emphasis added).

Since the bankruptcy court cannot exercise jurisdiction over the lease controversy in this case as a "core proceeding," it cannot do so merely because the parties consent.[17] In fact, the separation of powers may be more seriously jeopardized by a statutory mechanism that would invite politically powerful entities to engage in such forum-shopping. Fortunately, Article III *guarantees* the independence of those who exercise judicial power, which guarantee must be jealously guarded against such potentialities. For Article III to have any value at all, its guarantees cannot be swept aside by the wishes of adverse parties in a bankruptcy proceeding.

2. Holding That Consent Under 28 U.S.C. § 157(c)(2) May Be Implied Conflicts With Decisions Of The Eleventh And Seventh Circuits.

The Sixth Circuit held that Cain impliedly consented under § 157(c)(2),[18] which directly conflicts with the Eleventh Cir-

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[17] It appears that Congress devised the consent mechanism in reliance upon Chief Justice Burger's interpretation of the Court's holding in *Northern Pipeline*, 458 U.S. at 92. (Burger, C.J., dissenting). It does not necessarily follow from the dissent, or from the concurring opinion, at 458 U.S. at 91, that consent will always cure the jurisdictional defect as § 157(c)(2) provides. Consent was not an issue in *Northern Pipeline* so it is difficult to know exactly what was meant by the statements of Chief Justice Burger or Justice Rehnquist. But, whatever the Court did mean, it could not have meant that consent creates jurisdiction. *See, Schor*, 478 U.S. at 851.

[18] The sole basis for "express" consent in this case having been removed by the Sixth Circuit, *see* n.16, *infra*, at p.12, the only basis for consent left would be that it was implied.

cuit decisions in *In re: Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991) and *In re: Davis*, 899 F.2d 1136 (11th Cir. 1990) as well as the Seventh Circuit's holding in *The Home Insurance Company* v. *Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989).

The Seventh Circuit, in *The Home Insurance Company*, held that consent must not only be express, but must be in writing. Moreover, Section 157(c)(2) assigns the "leading role to the district judge," in deciding "whether to accept the parties' consent to referral (§ 157(c)(2))," 889 F.2d at 750, and, therefore, express consent must be made before the district court before referral of a proceeding to the bankruptcy judge. "[T]here was no reference, and consent, if any, was presented only to the bankruptcy judge." *Id.*

The consent to jurisdiction had been implied in that case under § 157(c)(2) by the failure of the parties to respond to a request by the bankruptcy judge for briefs concerning jurisdiction. The Seventh Circuit vacated the bankruptcy judge's ruling, and, reasoning that "silence is not a solid basis for an inference of consent," *id.* at 749, read Bankruptcy Rules 7008 and 7012 to require written express consent, and not before the bankruptcy judge which would cut the district judge out of the process.[19]

The Eleventh Circuit also rejected implied consent as sufficient under § 157(c)(2) in *In re: Brickell Investment Corp.* The Eleventh Circuit's decision in *In Re: Davis*, 899 F.2d 1136, moreover, highlights the Sixth Circuit's departure from the accepted and usual course of judicial proceedings.

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[19] The Sixth Circuit's reasoning also conflicts with the very case upon which it relied, *In re: Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987), which was pointed out in Cain's petition for a rehearing. Rules 7008 and 7012(b), effective August 1, 1989, render *Southern Industrial* no longer controlling in this case. Ironically, the Second Circuit has cited *Southern Industrial* as support for its holding in *In re: Mens Sportswear*, 834 F.2d 1134 (2nd Cir. November, 1987) that consent under § 157(c)(2) could be implied, but the Second Circuit also overlooked Bankruptcy Rules 7008 and 7012(b) even though decided after the Rules became effective.

3. Manipulating The Record On Appeal To Justify A Ruling Constitutes A Serious Departure From The Accepted And Usual Course Of Proceedings.

In *In re: Davis*, the bankruptcy judge entered a final order in a proceeding which was reviewed on appeal by the district court. On appeal to the Eleventh Circuit, appellant suggested that the bankruptcy judge's order be viewed as a proposal and the district court's review as the de novo adjudication. The Eleventh Circuit rejected this "strained reasoning" as "an unplausible post hoc reconstruction of events," 899 F.2d at 1141, and, the bankruptcy judge had not even ruled that the proceeding was "core" or "non-core." The Eleventh Circuit refused to conclude that the failure of a party to challenge jurisdiction until on appeal constituted consent sufficient to give the bankruptcy court jurisdiction over a "non-core" proceeding. The consent had to be "express," and there was no consent even though the party had expressly consented to jurisdiction over a related proceeding. The Sixth Circuit has gone even farther than the Eleventh Circuit refused to go and engaged in a post hoc reconstruction of events and, even though the proceeding below was explicitly ruled to be "core," held Cain to the standard which the Sixth Circuit viewed as applicable to an imaginary ruling and ruled that Cain consented.

Not only does the decision conflict with other circuits, there simply was no consent as a matter of fact and law. Basic logic applied to 28 U.S.C. § 157(c)(1) and (2) precludes an interpretation that consent is implied by failure to object. Subsection (1) communicates to litigants what to expect when faced with a ruling that a proceeding is "non-core;" it tells them that the bankruptcy court will "hear" the facts and make proposals to the district court. It requires no response but does make available choices not otherwise available, e.g., the right to mandatory abstention under 28 U.S.C. § 1334(c) if the dispute presents state law issues. Alternatively, one may choose under subsection (2) to have the bankruptcy court "hear and determine," but, in order for subsection (1) to have

any meaning, subsection (2) must at least require some affirmative act to express the choice. To hold that one may consent under § 157(c)(2) by merely proceeding does violence even to Congress' attempt to overcome the constitutional defects cited in *Northern Pipeline* by distinguishing between "core" and "non-core" proceedings. Therefore, the Sixth Circuit should not have reached § 157(c)(2), and the most the bankruptcy court should have done, under the statutory language, even if the proceeding was ruled "non-core," would be to make proposals. In this case, however, the ruling was that the proceeding was "core" (which was not even known until the order adjudicating the proceeding was entered) and 28 U.S.C. § 157(c)(2) was not even applicable.

A motion to lift the stay in this case is inherently a challenge to bankruptcy jurisdiction. Even before *Northern Pipeline*, an action to vacate a stay was viewed as defensive in nature and not consent for a bankruptcy judge to exercise summary jurisdiction. *In the matter of Roloff*, 598 F.2d 783 (3rd Cir. 1979); *In re Axton*, 641 F.2d 1262 (9th Cir. 1981). Even the filing of a counterclaim is not consent. *Beard* v. *Braunstein*, 914 F.2d 434 (3rd Cir. 1990). To rule that a counterclaim or a motion to lift the stay is consent to a bankruptcy judge exercising power over the movant is classic "jurisdiction by ambush." *In re: J.T. Moran Financial Corp.*, 21 Bankr.Ct.Dec. (CCR) 300 (Bankr. 1991).

Faced with a bankruptcy judge's ruling that the proceeding is "core," i.e., an official representation that the court is going to enter a final order, one has no choice but to proceed or risk a default judgment. Cain, faced with the loss of its right to use of the Property to a debtor in bankruptcy by the mere listing of an interest in the Property, was forced to choose between that loss and an "unconstitutional adjudication." *See Thomas*, 473 U.S. at 582.[20] Cain thus proceeded in bankrupt-

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[20] Violations of due process and the "taking clause" under the Fifth Amendment are also implicated by the reasoning in *Thomas* especially as it

cy court only to find out, after-the-fact, that, by fighting to get its property back, it had conferred jurisdiction on a bankruptcy judge to do what it otherwise had no jurisdiction to do.

This constitutes a violation of due process in many ways,[21] but especially in that the Sixth Circuit transformed the actual record, substituting the imaginary ruling *nunc pro tunc* for the actual ruling, without giving Cain notice and opportunity to respond to such a ruling before the bankruptcy judge. Consequently, Cain's conduct was judged by a standard which does not even statutorily come into being unless the imaginary record had been the true record.[22] Cain has been the victim of a classic "jurisdiction by ambush."

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applied to Stauffer Chemical. Stauffer, which had been subjected to a lengthy arbitration under FIFRA's data compensation scheme, subsequently joined in a suit challenging the arbitration process not only under Article III, but as a taking without just compensation and a violation of due process under the Fifth Amendment. The Court held that "Stauffer has an independent right to adjudication in a constitutionally proper forum, 458 U.S. at 579, and that "appellees state an independent claim under Article III, apart from any monetary injury sustained as a result of the arbitration." *Id.* at 580. One of the issues was whether Stauffer's claim was "ripe" yet. The issue, then, under *Thomas*, is not whether Cain waited too long to raise the Article III issue, but whether it acted too soon, and arguably Cain may wait until this decision is final and file an independent claim for compensation for the unlawful adjudication under Article III, as well as the Fifth Amendment, or even in addition to raising the Article III issue by the Rule 60(b)(4) motion.

[21] See n.27, *infra*, p.35; *Thomas*, 473 U.S. at 602, n.5 (Brennan, J., concurring) and *Northern Pipeline*, 458 U.S. at 81, n.33 (Brennan, J.).

[22] Finally, the Tenth Amendment is also implicated by a federal court, especially a non-Article III bankruptcy judge, adjudicating State law issues with an outcome as significant as the one in this case. *See The Home Insurance Company*, 889 F.2d at 749 (7th Cir. 1989).

III. CONCLUSION

There is an urgent need for this Court to act in this case, not only to settle the question whether BAFJA solves the jurisdictional defects of the Reform Act and whether bankruptcy courts can continue to adjudicate state law disputes even if clearly "core" under 28 U.S.C. § 157(b)(2), and not only to resolve the conflict among the circuits on the issue whether consent under 28 U.S.C. § 157(c)(2) may be implied, but to reorder Sixth Circuit jurisprudence in this case in accordance with fundamental due process.

Respectfully submitted,

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April 3, 1992

APPENDIX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

PRETRIAL ORDER

This cause came before the Court on June 15, 1989 at a pre-trial conference on the motion of the Debtor, as amended, to assume an unexpired lease, the motion of The Cain Partnership, Ltd. to lift the automatic stay, the written motions to intervene of Fleet National Bank and First National Bank of Louisville, and the oral motion made in open court of First Tennessee Bank National Association to intervene, and, based on the statements of counsel as announced in open Court, and for good cause shown, it is hereby

ORDERED that:

1. The motions to intervene of Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association are granted.

2. The parties shall stipulate to the authenticity and admissibility of documents relevant to the legal issues hereinafter mentioned, and the parties shall file the stipulations with the Court on or before June 22, 1989.

3. Intervenors, Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association shall file their briefs on the legal issues hereinafter mentioned on or before June 28, 1989; and The Cain Partnership, Ltd. and Pioneer Investment Services Company shall file their supplemental briefs on the same date.

4. The legal issues to be initially heard by the Court in this case are as follows:

a. Whether the Debtor, Pioneer Investment Services Company, has any responsibility for the use of the property which The Cain Partnership, Ltd. alleges was used unlawfully.

b. Whether, in the absence of any pre-petition action taken by The Cain Partnerhsip, Ltd., the lease was terminated prior to the filing of the Chapter 11 petition.

c. Whether the leasehold interest acquired by the Debtor from Premiere Investment Properties, Inc. is capable of termination in light of the fact that there existed no express provision in the Colonial Enterprises Lease specifying the manner and/or means by which termination or forfeiture shall occur and the right of reentry and repossession.

5. The Court will hear oral argument on the legal issues stated above on July 14, 1989 at 1:30 p.m. The Debtor shall have thirty (30) minutes for oral argument, The Cain Partnership, Ltd. shall have thirty (30) minutes for oral argument, and the intervenors, Fleet National Bank, First National Bank of Louisville, and First Tennessee Bank National Association, each shall have fifteen (15) minutes for oral argument.

6. The legal issues stated above may be dispositive of these motions. If the decision of the Court on the legal issues stated above is not dispositive of these motions, the Court shall set a hearing, at a later date, on the following issues:

a. If the documents executed relative to the subject property do not absolve the Debtor of responsibility with respect to the uses of the property upon which The Mouse's Ear is located, should the documents be reformed to that effect?

b(1). Was a portion of the property for which the Debtor

is allegedly responsible assigned or sublet for an unlawful purpose?

b(2). If property demised by the Colonial Enterprises lease is used for an unlawful purpose or used to or as the place from which or by which a state or federal statute is violated, is thereby a breach of the Colonial Enterprises lease accomplished?

b(3). Does the common law, at the behest of a landlord, terminate a lease of real property if the lessee either uses the demised property for an unlawful purpose, or as the place from which or by which a public nuisance if maintained, or to violate any municipal ordinances, state or federal statute or penal law?

b(4). Can an absentee landlord, who knows or should know that real property owned by and/or leased from the landlord is being used in such a way as to be a public nuisance, be held criminally liable in Tennessee for maintaining a public nuisance?

c. Is The Cain Partnership, Ltd. estopped to assert a default for failure of the Debtor to pay certain real property taxes prior to commencement of the case?

d. Is The Cain Partnerhsip, Ltd. estopped to assert that the uses of a portion of the property for which the Debtor is allegedly responsible constitute a defult under the terms of the lease?

e(1). Is The Cain Partnership, Ltd. estopped to assert that the alleged sublease to The Mouse's Ear constitutes a default?

e(2). Is The Cain Partnership, Ltd. estopped to assert that uses made of the alleged property subleased to The Mouse's Ear constitute breaches of the lease?

f. Has The Cain Partnership, Ltd. waived pre-petition defaults by acceptance of rent payments?

g(1). Is The Cain Partnership, Ltd. estopped to assert a default with respect to payment of taxes by reason that Valley Fidelity Bank was responsible for payment of such taxes under the Escrow Agreement and was also a 40% limited partner in The Cain Partnership, Ltd.?

g(2). Is there a conflict between the interest of Valley Fidelity Bank & Trust Company ("Valley") in its role as escrow agent for Debtor and Debtor's lenders and in its role as Trustee of The Lillie Mae Cain Testamentary Trust (the fee simple owner of the real property leased and/or subleased by Debtor, which leasehold is pledged by Debtor to its lenders)?

g(3). Is The Lillie Mae Cain Testamentary Trust a legal entity separate and apart from its Trustee which is neither bound nor encumbered by acts of its Trustee which acts constitute breaches of the fiduciary duty which the Trustee owes the Trust and its beneficiaries?

g(4). Was it a breach of the fiduciary duty to the Trust for Valley, as Trustee, to serve, at the same time, as escrow agent for Debtor and its lenders and as Trustee for the Trust and its beneficiaries?

g(5). Did Debtor and its lender waive their right to hold Valley liable for damages otherwise collectible from Valley because Valley served as the escrow agent to Debtor and its lenders while burdened with a conflict with the interests of Debtor and its lenders?

g(6). Is Valley liable to Debtor's lenders and/or the bankruptcy estate of Debtor either in tort or for breach of contract for damages arising out of the failure of Valley to perform its obligation to Debtor and its lenders to pay the taxes "promptly when due"?

h. Is the Debtor a thrid-party beneficiary of the Estoppel Agreement in favor of Fleet National Bank?

i. Are the alleged unlawful purposes or acts on a portion of the property alleged to be the responsibility of the Debtor "incurable"?

j. Is the failure to timely pay taxes "incurable"?

k. In the absence of any requirement in the lease agreement requiring same, does applicable non-bankruptcy law require a lessor to provide notice, demand and/or a reasonable opportunity to cure defaults under a lease?

l. Is there any privity of contract between The Cain Partnership, Ltd. and Debtor?

m. Is Debtor merely a sublessee?

n. Is Premiere Investment Properties, Inc. the landlord of Debtor?

o. Is Premiere Investment Properties, Inc. merely, but still, a sublessee?

p. Is Colonial Enterprises, Inc. the landlord of Premiere Investment Properties, Inc.?

q. Is the tenant of The Cain Partnership, Ltd. a tenant-at-sufferance?

r. Is the tenant of The Cain Partnership, Ltd. a periodic tenant?

s. Have there occurred, post-petition, unlawful uses and uses in violation of statutes of the demised premises which cannot be cured by Debtor and which make the lease unassumable by Debtor?

The issues presented in paragraph 6 are a compilation of all of the issues submitted by the parties hereto. By the inclusion of the issues in this pretrial order, no party is precluded from arguing that any of the issues submitted by any other party are not properly before the court. Any party may suggest to the court, through appropriate pleading, that any of the foregoing issues are not to be determined within the context of a decision on the motion for stay relief and/or the motion for assumption of the unexpired lease. The listed issues in paragraph 6 may be modified subsequent to the disposition of the issues listed in paragraph 6 may be modified subsequent to the dispositon of the issues listed in paragraph 4.

7. The Cain Partnership, Ltd. and all other parties agree that the automatic stay of 11 U.S.C. § 362 shall remain in effect until further order of this Court pending a final decision of the Court on the motion of The Cain Partnership, Ltd. to lift the stay.

ENTER: this the ____ of June 1989.

ENTER: June 27, 1989.

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPROVED FOR ENTRY:
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APPENDIX B

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 3-89-01058

PIONEER INVESTMENT SERVICES COMPANY a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY

Debtor

MEMORANDUM ON THE CAIN PARTNERSHIP'S MOTION TO LIFT AUTOMATIC STAY AND ON DEBTOR'S MOTION FOR APPROVAL OF ASSUMPTION OF EXECUTORY CONTRACT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

This matter is before the court on two motions: (1) a motion filed May 25, 1989, by The Cain Partnership, Ltd. (Partnership), seeking termination of the automatic stay (Automatic Stay Motion) to permit it to repossess and reenter certain real property in Knox County, Tennessee, held by the debtor under the terms of a lease (the Colonial Lease);[1] (2) a "Motion For Approval Of Assumption Of Executory Contract" (Motion To Assume) filed May 18, 1989, by the debtor.[2] By its Motion To Assume the debtor seeks an order pursuant to 11 U.S.C.A. § 365(a) (West Supp. 1989) authorizing it to assume the Colonial Lease.

The court has authorized Fleet National Bank (Fleet), First National Bank of Louisville, and First Tennessee Bank National Association (Intervenors), each of whom holds a mortgage encumbering the leasehold estate, to intervene in this contested proceeding.

All facts and documents essential to a resolution of the motions filed by the Partnership and debtor have been stipulated under the terms of written stipulations filed June 22 and July 24, 1989.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (G) and (O) (West Supp. 1989).

I

The Partnership contends that the Colonial Lease was automatically terminated prior to the April 12, 1989 filing of

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[1] The debtor and Partnership, pursuant to a pretrail order entered June 27, 1989, agree that the automatic stay will remain in effect pending resolution of the Automatic Stay Motion.

[2] The debtor's Motion To Assume was supplemented by an "Amended Motion For Approval Of Assumption Of Executory Contract" filed June 9, 1989.

the debtor's Chapter 11 petition. This assertion is grounded upon the failure of the debtor to pay real property taxes assessed against the leasehold property.[3] Additionally, the Partnership alleges termination of the Colonial Lease due to the use, prepetition and postpetition, of a portion of the leasehold property for an unlawful activity.

The Partnership, debtor, and Intervenors raise a substantial number of issues. However, as set forth in a Pretrial Order entered June 27, 1989, the questions for the court to determine at present are threefold: (1) whether the debtor has any responsibility for the use of 5.71 acre tract which the Partnership contends was, and presently is, being used unlawfully;[4] (2) whether, in the absence of any prepetition action taken by the Partnership, the debtor's leasehold estate was terminable prior to the filing of its Chapter 11 petition; and (3) whether the leasehold estate held by the debtor is capable of termination by the Partnership. Should the court resolve these three issues in favor of the debtor, all other issues identified in the Pretrial Order will be rendered moot.

II

An analysis of a number of stipulated documents, all of which are duly recorded, is essential to a complete understanding and resolution of the three legal issues under consideration. The relevant documents, and the facts they establish, follow.

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[3] These taxes were paid by the Partnership. The parties stipulate the debtor's present ability to reimburse the Partnership the amount of taxes plus interest. The parties further stipulate that upon a finding by the court that the lease was not terminated prior to the filing of the debtor's Chapter 11 petition, the Partnership will not assert the debtor's failure to pay these taxes in opposition to its Motion To Assume.

[4] The court has couched this issue in terms set forth in the Pretrial Order. More succinctly, the issue is whether the 5.71 acre tract constitutes a part of the debtor's leasehold estate.

DOCUMENT NO. 1

The Colonial Lease dated April 11, 1974

On April 11, 1974, the Partnership leased to Colonial Enterprises, Inc. (Colonial) 95.5 acres of land located at a site near the intersection of Kingston Pike and Cedar Bluff Road in Knox County, Tennessee.[5] Under the Colonial Lease, Colonial agreed to pay an annual rent of $18,000 as well as all real property taxes assessed against the 95.5 acres. Further, Colonial was given an option to extend the lease for an additional twenty years beyond its original twenty-year termination date.

Numbered paragraph 1. on page 3 of the April 11, 1974 Colonial Lease provides:

> This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the lessee. . . .

The Colonial Lease does not contain any default or forfeiture clauses in the event of a breach by Colonial or its successors.

DOCUMENT NO. 2

"Amendment To Lease" dated April 1, 1977

The Colonial Lease was amended April 1, 1977, by an "Amendment To Lease" which provided Colonial with additional options to extend the April 11, 1974 lease fifty-five years beyond the original option expiration period. Under this amendment, Colonial also returned 1.65 acres of the original 95.5 acre tract to the Partnership, thus reducing its leasehold estate to 93.85 acres. The April 1, 1977 "Amendment To Lease" does not contain any default or forfeiture provisions.

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[5] Other stipulated documents evidence the date of the execution of the Colonial Lease as April 4, 1974, and refer to the April 11, 1974 document as a Memorandum of Lease. These disparities are immaterial.

DOCUMENT NO. 3

"Agreement" dated August 7, 1978

On August 7, 1978, Colonial sublet "four (4) to five (5) acres" of the 93.85 acre leasehold estate acquired from the Partnership to a corporation by the name of Omie, Inc. (Omie). This sublease contains no description of the sublet acreage beyond that quoted above.

DOCUMENT NO. 6

"Lease Modification and Clarification Agreement" dated January 26, 1984

The August 7, 1978 sublease "Agreement" between Colonial and Omie (Document No. 3) was subsequently amended by a "Lease Modification and Clarification Agreement" executed January 26, 1984. This document describes by metes and bounds a 5.71 acre tract which is identified as the subject of the August 7, 1978 "Agreement."

DOCUMENT NO. 4

"Sublease" dated September 1, 1979

On September 1, 1979, O & S Development Co., as "Sublessor," executed a "Sublease" in favor of John Browning, "Sublessee."[6] This "Sublease" contains no description of the subleased property by metes and bounds, street address, or otherwise. Consequently, its ability to convey any interest in property held by Omie or its successor, O & S Development Co., is questionable.[7]

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[6] The index filed with the stipulated documents parenthetically refers to O & S Development Co. as "successor to Omie, Inc." The court will rely on that stipulation notwithstanding that the record before it does not establish O & S Development as the successor to Omie.

[7] The parties do not dispute that this "Sublease" served to sublet a portion of the 5.71 acre tract leased by Omie from Colonial. The Partnership avers it is on this tract that a place of business operating under the name of the "Mouse's Ear" is engaging in unlawful activity.

DOCUMENT NO. 5

"Lease Agreement" dated October 21, 1983

A "Lease Agreement" was executed by Omie, as "Sublessor," on October 21, 1983, in favor of John Roberts and Michael Thomas, "Sublessee" [sic], whereby Omie sublet .81 acres of the 5.71 acre tract leased by it from Colonial.

DOCUMENT NO. 8

"Assignment Of Lease" dated February 1, 1984

On February 1, 1984, Colonial, as "Assignor," executed an "Assignment Of Lease." By this document, Colonial "assigned" its interest in the 5.71 acre tract sublet to Omie on August 7, 1978 (Documents No. 3 and 6) to a corporation by the name of Orange Tee, Inc. (Orange Tee), "Assignee." The "Assignment Of Lease" provides in material part:

> [T]he [5.71 acres] . . . is hereby assigned from Colonial . . . to . . . Orange Tea, Inc. who shall hereinafter stand in the stead and place of [Colonial] and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 [sublease "Agreement" between Colonial and Omie (Documents No. 3 and 6)]. . . .

DOCUMENT NO. 10

"Assignment Of Lease" dated July 17, 1984

On July 17, 1984, Colonial entered into an "Assignment Of Lease" with Premiere Investment Properties, Inc. (Premiere), under which it transferred and assigned its interest in the April 11, 1974 Colonial Lease (Document No. 1) to Premiere. More specifically, this "Assignment Of Lease" provides in material part:

> Colonial [Assignor] . . . hereby transfers, assigns and sets over unto Premiere [Assignee] . . . all of the right, title and interest of the Assignor in and to that certain Lease, dated April 11, 1974, from The Cain Partner-

> ship, Ltd. to Colonial . . . as evidenced by a certain Memorandum of Lease Agreement, dated April 11, 1974. . . . The real property affected by such Lease, as amended, is described in Exhibit A attached hereto and incorporated herein by reference.

Exhibit A to the July 17, 1984 "Assignment Of Lease" contains metes and bounds descriptions of two tracts: Tract 1 is an 86.54 acre tract; Tract 2 is a tract containing an unspecified acreage. The parties do not dispute the intent or effect of this instrument — that Colonial's interest in the leasehold property acquired from the Partnership on April 11, 1974 (Document No. 1), was transferred and assigned to Premiere.

DOCUMENT NO. 14

"Assignment Of Lease" dated April 13, 1987

On April 13, 1987, Premiere transferred its interest in the Colonial Lease acquired July 17, 1984, (Document No. 10), to the debtor by way of an "Assignment Of Lease." This document provides in material part:

> Premiere [Assignor] . . . hereby transfers, assigns and sets over unto Pioneer [Assignee] . . . all of the right, title and interest of the Assignor in and to that certain Lease, dated April 11, 1974, from The Cain Partnership, Ltd., to Colonial . . . as evidenced by a certain Memorandum of Lease Agreement, dated April 11, 1974 . . . as amended by Amendment to Lease, dated April 1, 1977. . . . Such Lease, as amended, was assigned from Colonial . . . to Assignor by Assignment of Lease, dated as of July 17, 1984. . . . The real property affected by this Lease, as amended, is described in Exhibit A attached hereto and incorporated herein by reference.

Exhibit A, describing the real property affected by the "Assignment Of Lease," contains a description of a single

tract: the 86.54 acre tract described in the July 17, 1984 "Assignment Of Lease" from Colonial to Premiere (Document No. 10).

DOCUMENT NO. 17

"Lease Assumption And Attornment Agreement" dated April 16, 1987

On April 16, 1987, the debtor and Partnership entered into a "Lease Assumption And Attornment Agreement" under which the Partnership recognized the debtor as the tenant under the Colonial Lease.

DOCUMENT NO. 20

"A Non-Disturbance And Attornment Agreement" dated June 16, 1987

On June 16, 1987, the Partnership, Omie, Orange Tee, and others, executed a document designated "A Non-Disturbance And Attornment Agreement." This document, at paragraph (iv) of a section entitled "*RECITALS*," contains a statement that "Orange Tee has succeeded to the interest of Colonial . . . pursuant to Assignment dated February 1, 1984. . . ." (Document No. 8). Paragraph (i) of this document in a section entitled "*AGREEMENT*" further provides:

> (i) [The Partnership] and Orange Tee do not object and hereby consent to all of the Leases as set forth herein . . . and specifically those leases by which Omie . . . shall occupy tracts 1 and 2 of the premises described on Exhibit "A" and further agree that in the event of a termination, cancelation or modification or any other change with respect to any of the Parent Leases [i.e., the lease from Owner to [the] Partnership . . . or the Lease from [the] Partnership to Colonial . . . (*assigned to Orange Tee by Assignment* . . .)] the rights of Brown and Omie and its successors and assigns to possession and use of the premises in accordance with the subleases from Colonial . . . to Omie . . .

> shall not be affected so long as Brown and Omie or their successors or assigns are performing their obligations as stated in said Subleases[.] (emphasis added.).

Exhibit A to the June 16, 1987 "A Non-Disturbance And Attornment Agreement" specifically includes the 5.71 acres sublet by Colonial to Omie under the terms of the August 7, 1978 sublease, as modified January 26, 1984 (Documents No. 3 and 6).

III

ISSUE NO. 1

DEBTOR'S RESPONSIBILITY FOR USE OF PROPERTY WHICH THE PARTNERSHIP CONTENDS WAS AND IS BEING USED UNLAWFULLY

Under the broad heading of the first issue, the court must consider whether the 5.71 acres "assigned" to Orange Tee by Colonial under the February 1, 1974 "Assignment Of Lease" (Document No. 8) divested Colonial of all further interest in this tract. If so. Colonial could not have assigned its interest in this acreage to Premiere (Document No. 10), and Premiere, in turn, could not have assigned any interest in the acreage to the debtor (Document No. 14). The debtor cannot be held accountable for an unlawful use of property which is not part of its leasehold estate.[8]

The debtor contends that under the terms of the Colonial Lease (Document No. 1), Colonial had the power to assign its leasehold estate in whole or in part. The debtor also contends that once Colonial assigned its interest in the 5.71 acres to

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[8] It is undisputed that the activity alleged by the Partnership to be unlawful is occurring in connection with the operation of the business known as the "Mouse's Ear." It is also undisputed that this business is situated on a portion of the 5.71 acre tract subleased to Omie by Colonial (Documents No. 3 and 6). This same 5.71 acre tract is the subject of the "Assignment Of Lease" executed February 1, 1984, by Colonial in favor of Orange Tee. (Document No. 8).

Orange Tee, it was without further power to assign the 5.71 acres to Premiere. The debtor further argues that not only is the Partnership aware that the 5.71 acre tract is not part of the debtor's leasehold estate, it has acquiesced in and ratified a series of leases, subleases, and assignments which establish that the 5.71 acres was excluded from the estate leased to Premiere and the debtor. Finally, the debtor contends that the Partnership has waived its right to argue that the assignment to Orange Tee was invalid.

The Partnership asserts that the assignments from Colonial to Premiere (Document No. 10) and from Premiere to the debtor (Document No. 14) included Colonial's interest in the 5.71 acres. The Partnership argues that the Colonial Lease allowed Colonial to sublet the 95.5 acres "in whole or in part" but permitted it to assign only the entire leasehold. See discussion of Document No. 1, p. 6. The Partnership argues that the purported assignment by Colonial to Orange Tee was in reality a sublease. It further contends that it never consented to any assignment of the 5.71 acres by Colonial to Orange Tee. The court disagrees.

Initially, it must be determined whether the February 1, 1984 "Assignment Of Lease" from Colonial to Orange Tee (Document No. 8) constituted an assignment of Colonial's leasehold interest in the 5.71 acres. The Tennessee Supreme Court has stated:

> [T]he general distinction between an assignment of a lease and a sublease is that the former conveys the whole term, leaving no interest or reversionary interest in the assignor, while the latter grants the subtenant an interest in the leased premises less than the lessee's, or reserves to the lessee a reversionary interest in the term.

First American National Bank v. *Chicken System of America, Inc.*, 510 S.W.2d 906, 908 (Tenn. 1974). *See also Murphy* v. *Reynolds*, 212 S.W.2d 686 (Tenn. Ct. App. 1948) (*cert. denied* 1948); 6 Am.Jur.2d, *Assignments*, § 1 (1963 & Supp. 1989); 3 Restatement of (Second) Contracts § 317 (1981).

The February 1, 1984 "Assignment Of Lease" (Document No. 8) exectued by Colonial in favor of Orange Tee states:

> [T]he [5.71 acres] is hereby assigned . . . to Orange Tee, Inc., who shall hereinafter stand in the stead and place of Assignor *and* be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement. (emphasis added).

The February 1, 1984 "Assignment Of Lease" labels the transaction an "assignment." The quoted passage indicates that Orange Tee was assigned Colonial's interest in the 5.71 acres "and" that Orange Tee would assume Colonial's position relative to Colonial's sublessee, Omie (Documents No. 3 and 6). Viewing the entire document, it is patently clear that Colonial, through the "Assignment Of Lease," intended to assign its entire interest in the 5.71 acre leasehold estate to Orange Tee. The court concludes that the February 1, 1984 "Assignment Of Lease" (Document No. 8) divested Colonial of any further interest in the 5.71 acres.

The language in the Colonial Lease (Document No. 1) — "This lease may be assigned or the leased premises may be sublet in whole or in part . . ." — did not restrict the power of Colonial to assign a part of its leasehold estate, i.e., the 5.71 acres, to Orange Tee. Tennessee courts have set forth principles to guide this court in its analysis and interpretation of the disputed phrase.

"It is the Court's duty to enforce contracts according to their plain terms." *Bob Pearsall Morots, Inc.* v. *Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). *Accord Cocke County Bd. of Highway Commissioners* v. *Newport Utilities Bd.*, 690 S.W.2d 231, 237 (Tenn. 1985).

The Partnership suggests that an examination of the phrase — "This lease may be assigned or the leased premises may be sublet in whole or in part . . ." — leads to the conclusion that an assignment of less than the entire lease is prohibited.

The quoted phrase is arguably susceptible of three possible interpretations: (1) that the language "in whole or in part" has application to both an assignment and subletting of the

leasehold estate; (2) that, as is suggested by the Partnership, "in whole or in part" applies only to subletting; and (3) that notwithstanding that the disputed phrase may refer exclusively to subletting, there is still no limitation on Colonial's power to assign the lease "in whole or in part." The ambiguity in this phrase indicates that a plain meaning analysis is not possible.

One court has stated that "[t]he cardinal rule for interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention, consistent with legal principles." *Bob Pearsall Motors, Inc.* v. *Regal Chrysler-Plymouth, Inc.* 521 S.W.2d 578, 580 (Tenn. 1975). *See also Ballard* v. *North American Life and Casualty Co.*, 667 S.W.2d 79 (Tenn. Ct. App. 1983).

Under the rule of "practical construction," ambiguous provisions should be interpreted in accordance with the interpretation apparently placed upon them by the parties as shown by their conduct. *Hamblen County* v. *City of Morristown*, 656 S.W.2d 331, 335 (Tenn. 1983); *Duncan* v. *Peebles*, 192 S.W.2d 235 (Tenn. Ct. App. 1946); *Frierson* v. *International Agricultural Corp.*, 148 S.W.2d 27 (Tenn. Ct. App. 1940) (*cert. denied* 1941).

In the instant proceeding, the intention of the Partnership and Colonial, as evidenced by their conduct, is the appropriate basis upon which the disputed phrase should be interpreted.[9] That intention is readily ascertainable.

The Partnership expressly acknowledged and consented to the assignment of the 5.71 acre tract to Orange Tee in the June 16, 1987 "A Non-Disturbance And Attornment Agreement" (Document No. 20), discussed *supra*. Not until after the debtor filed its bankruptcy petition did the Partnership question the legal significance of Colonial's assignment to

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[9] The record does not establish whether the Partnership or Colonial drafted the April 11, 1974 Colonial Lease. Therefore, the rule of construction which provides that where language of a contract lacks clarity, the contract will be construed most strongly against the party who drew it, cannot be applied. *Hanover Ins. Co.* v. *Hanley*, 425 S.W.2d 590 (Tenn. 1968); *Coble Systems, Inc.* v. *Gifford Co.*, 627 S.W.2d 359 (Tenn. Ct. App. 1981).

Orange Tee. The conduct of the Partnership confirms the intention of the parties under the April 11, 1974 Colonial Lease (Document No. 1) — Colonial had the right to assign its leasehold estate "in whole or in part."

In addition, the Partnership has ratified the assignment to Orange Tee. In an unrelated case involving the Partnership, *Valley Fidelity Bank and Trust Company* v. *The Cain Partnership, Ltd.*, 738 S.W.2d 638 (Tenn. Ct. App. 1987), the successor trustee brought an action against the Partnership and the three Cain sisters seeking declaratory relief regarding the amount of rental money and the successor trustee was required to collect from the Partnership. Speaking to ratification, the court stated:

> A voidable contract is subject to ratification. . . . [R]atification can be described as "confirmation after conduct" manifested by acts or statements. Silence can amount to a ratification where a party with knowledge of the transaction fails for a reasonable time to protest or dissent. However, there can be no ratification unless a party is informed of the facts necessary to form an opinion.

738 S.W.2d at 639-640 (citation omitted). *See Trotter* v. *Peterson*, 60 S.W.2d 149 (Sup. Ct. Tenn. 1933).

The Partnership expressly ratified the February 1, 1984 Colonial "Assignment Of Lease" to Orange Tee (Document No. 8). By its execution of the June 16, 1987 "A Non-Disturbance and Attornment Agreement" (Document No. 20), the Partnership specifically acknowledged that "Orange Tee has succeeded to the interest of Colonial . . . [in the 5.71 acres] pursuant to Assignment dated February 1, 1984. . . ." (Document No. 20, *RECITALS*, par. (iv)). The Partnership cannot now complain that it did not know of the assignment until recent months. By its acts the Partnership has expressly ratified Colonial's assignment of te 5.71 acres to Orange Tee.[10]

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[10] Arguably, the Partnership has waived its right to now object to the

Once the 5.71 acres had been assigned to Orange Tee, Colonial lacked the power to transfer that acreage to Premiere. *Union & Planters Bank & Trust Company* v. *Linden St. Christian Church*, 3 Tenn. App. 540 (Tenn. Ct. App. 1926) (*cert. denied* 1926): *see also Kivett* v. *Mayes*, 354 S.W.2d 492 (Tenn. Ct. App. 1961) (*cert. denied* 1961). The February 1, 1984 "Assignment Of Lease" (Document No. 8) executed by Colonial in favor of Orange Tee, effectively removed the 5.71 acres from the Colonial leasehold estate. The debtor is, therefore, not accountable for the conduct of any alleged unlawful activity on the property.

Issue No. 1 is resolved in favor of the debtor.

IV

ISSUE NO. 2

TERMINABLE NATURE OF DEBTOR'S LEASE PRIOR TO BANKRUPTCY

The second issue before the court is whether in the absence of some affirmative action by the Partnership to terminate the Colonial Lease, the lease was terminable prior to the filing of the debtor's Chapter 11 petition. It is undisputed that the Partnership took no action to terminate the lease.

The Partnership contends that notwithstanding the absence of action on its part to terminate the Colonial Lease prior to the filing of the debtor's bankruptcy petition, the Colonial Lease was nonetheless terminated at the time the debtor filed its petition.[11] The debtor submits that the failure of the Part-

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assignment to Orange Tee. *See Woods* v. *Forest Hill Cemetery*, 192 S.W.2d 987 (Tenn. 1946); *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876); 20 Am. Jur.2d *Covenants, Conditions, and Restrictions*, § 18 (1965). In view of the determinations reached *supra*, the court need not reach this question.

[11] Alternatively, the Partnership argues that in the event the court determines a termination clause is not essential to its ability to terminate the lease, but that notice and demand were required and such demand was not given, then all the debtor had on the date it filed its petition was a periodic tenancy for one year. The court need not address this argument.

nership to take affirmative action to terminate the Colonial Lease prior to bankruptcy defeats the Partnership's argument that the lease was terminated prepetition.

Affirmative conduct is required by a lessor to terminate a nonresidential lease which lacks a forfeiture clause. The Tennessee Court of Appeals recently stated:

> Tennessee follows to a point an ancient common law rule that to be an effective forfeiture, the landlord must demand the rent on the day it is due before sunset, and at the most public place on the land. *Parks* v. *Hays*, 92 Tenn. 161, 162, 22 S.W. 3,4 ([Tenn.] 1893). However, the necessity of demand as a condition precedent to the forefeiture of a lease may be waived by agreement.
>
> . . .
>
> In the instant case, the language in the lease is clear and unmistakable. Upon the breach of any of the conditions stated in the lease, the plaintiff reserved the right to declare the lease forfeited within ten days after notice of default. . . . [the lessee] was given the proper notice . . . A "ten day to cure" clause is reasonable. *It prevents an automatic forfeiture which is not favored by the court because of its harshness.*

Nashville Record Productions, Inc. v. *Mr. Transmission, Inc.*, 623 S.W.2d 281, 283 (Tenn. Ct. App. 1981) (emphasis added).

In *Arnold* v. *Lemond*, 241 S.W.2d 430 (Tenn. 1951), a case concerning the lease of a nonresidential building, the court stated:

> The common law rule is that to effect a forfeiture of the lease for nonpayment of rent, the landlord must make demand before the close of the day that the rent becomes due.

Id. at 432.

In *Planters Insurance Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563

(Tenn. 1876), the disputed lease contained a forfeiture clause providing for termination of the lease upon the failure of the leasee to pay the real property taxes. The court stated:

> It has long been settled as part of the common law that forfeitures for conditions of the kind found in this lease are not favored by the courts. . . .
>
> . . .
>
> [F]orfeiture is to be enforced at the option of the lessor, and by an affirmative act on his part, that is by re-entry for such purpose, based on failure to perform or breach of the conditions, and do not take effect until this is done. In courts of equity the rule is settled, that such forfeitures are relieved against whenever compensation can be made, the clause for re-entry being treated as a mere security for the payment of the rent.
>
> . . .
>
> This case is to perform a collateral condition, however, that is, to pay the taxes, but the principle is substantially the same. . . . [I]f the payment be made before the forfeiture is taken advantage of by re-entry by the landlord for this purpose, in accordance with the provision contained in the lease, the forfeiture is saved. The forfeiture is only enforceable by such affirmative action. . . .

Id. at 567-69.

Thus, automatic forfeiture of a nonresidential lease is not favored in Tennessee. *Planters, supra; Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281, 283 (Tenn. Ct. App. 1981); *see generally, Allen* v. *Dent*, 72 Tenn. 676 (Tenn. 1880).

The law in Tennessee clearly requires that the lessor make demand upon the lessee unless the parties agree otherwise. The Colonial Lease lacks any clause denoting such an agreement.[12]

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[12] It is of academic interest that the Partnership, on April 16, 1987,

In the absence of affirmative action by the Partnership prior to the commencement of this case, April 11, 1974 Colonial Lease was not terminable.

Issue No. 2 is resolved in favor of the debtor.

V

ISSUE NO. 3

WHETHER THE DEBTOR'S LEASEHOLD INTEREST IS CAPABLE OF TERMINATION IN THE ABSENCE OF AN EXPRESS PROVISION IN THE COLONIAL LEASE SPECIFYING THE MANNER AND/OR MEANS BY WHICH TERMINATION OR FORFEITURE SHALL OCCUR

The third issue confronting the court is whether in the absence of a forfeiture clause the Colonial Lease automatically terminated prior to bankruptcy because of the debtor's failure to pay property taxes assessed against the leasehold estate. The Partnership asserts that the very absence of an explicit provision in the Colonial Lease specifying prerequisites to termination makes the Lease "terminable concomitant with a breach."[13] Partnership's *Revised Memorandum* at p. 2. The debtor argues that the lack of a termination clause in the event of default or forfeiture means that there is no basis on which the lease could terminate prior to its stated expiration date.

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through an unrecorded "Estoppel Certificate and Agreement" executed by it and Fleet, burdened itself with providing Fleet notice and an opportunity to cure any default by the debtor under the April 11, 1974 Colonial Lease. (Document No. 18, p. 2-3, par. 8(e) and (f)). The debtor was not a party to this document.

[13] The Partnership argues that "the refusal of the Partnership to lease the property to Colonial burdened with special conditions in order to effectuate a termination, is an explicit benefit bargained for by the Partnership." *Revised Memorandum* at p. 2. No evidence has been offered demonstrating that the Partnership bargained to exclude a termination clause from the Colonial "Lease." It is difficult to give credence to this assertion.

The Partnership interprets a recent unreported Tennessee court of appeals case to stand for the proposition that in the absence of a termination clause in a nonresidential lease, termination upon an act of default occurs automatically. *Pizza Pumps of America, Inc.* v. *Krispy Kreme Doughnut Corp.*, 11 TAM 52-13 (Tenn. Ct. App. 1986) (available on WESTLAW at 1986 WL 12174).[14] *Pizza Pumps* cannot be read to stand for this proposition.

In *Pizza Pumps*, the disputed lease contained in default clause which specified notice and an opportunity to cure should the lessee default. The lease provided that failure of the sublessee to pay rent when due was a default; that the sublessee would have thirty (30) days from the date of notice of default to cure the default; but that there would be no thirty (30) day period to cure a default in the payment of rent.

To the Tennessee Court of Appeals, the issue concerned whether notice of default and an opportunity to cure were required in the face of the late paid rental payments. The court concluded that despite the language in the lease requiring notice and an opportunity to cure upon default, the provision concerning late rental payments meant that upon the lessee's failure to pay the rent when due, the lessor could regard the lease as forfeited. The court found that the lease had terminated as per its terms.

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[14] This court is reluctant to accord *Pizza Pumps*, an unpublished opinion, any precedential value. In construing the weight of an unpublished Tennessee state court opinion, the Tennessee Supreme Court has noted its unwillingness to rely on such opinions. *Fisher* v. *State of Tennessee*, 277 S.W.2d 340 (Tenn. 1955). The court further stated that where there is no authority for a matter except in an unpublished opinion, "the opinion is not to be taken as general authority," *Id.* at 341; *Southern Railway Co.* v. *Foote*, 384 F.2d 224 (6th Cir. 1967) (As unpublished Tennessee state court opinions are not binding upon Tennessee state courts, neither are they binding on federal courts.); *Waldschmidt* v. *Smith (In re York)*, 43 B.R. 36 (Bankr. M.D. Tenn. 1984).

In this matter, the court is not bound by the holding in *Pizza Pumps*. In view of the importance the Partnership places upon the case, this court will, however, comment on this unpublished opinion.

The Partnership misinterprets *Pizza Pumps* to stand for the proposition that upon a lessee's default notice and demand are not required absent a provision in the lease requiring notice and demand. The Partnership ignores the facts. In *Pizza Pumps*, the parties contracted for specific courses of action should the sublessee commit various acts of default. Specifically, if the act was a failure to timely pay the rental payments, the parties agreed that the lease would terminate automatically without notice and an opportunity to cure. No such agreement exists in the Colonial Lease. *Pizza Pumps* is inapposite.

The Partnership also relies on *Murphy* v. *Reynolds*, 212 S.W.2d 686 (Tenn. Ct. App. 1948) (*cert. denied* 1948). In *Murphy*, the disputed lease enumerated various acts of default including a prohibition against an assignment of the leasehold property. The lease also provided that the lessor, should an act of default occur, had the option to cancel the lease by giving thirty (30) days notice to the lessee.[15] The Tennessee Court of Appeals determined that the lessee had assigned the lease in violation of the lease agreement. Therefore, it upheld the lower court's finding that the lease had been terminated.

Murphy, the Partnership argues, demonstrates that there is no rule in Tennessee requiring notice, demand, or an opportunity to cure. Contrary to the Partnership's interpretation, *Murphy* stands for the simple proposition that where a lessee commits a specified act of default, Tennessee courts will enforce the contractual agreement of the parties relative to the effect of that default. *Murphy* does not support the Partnership's assertion that the Colonial Lease can automatically terminate in the absence of a termination clause.

Another case relied upon by the Partnership is *In re Memphis-Friday's Associates*, 88 B.R. 830 (Bankr. W.D. Tenn. 1988). The court in *Memphis-Friday's* had before it an involuntary Chapter 11 debtor's motion to assume a

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[15] However, it appears that the power of the lessee to cure a default upon notice was not included in the lease.

nonresidential lease. The lease contained a default clause and a provision allowing the debtor an opportunity to cure. The court determined that the lessor had given the required notice; that the debtor had not cured the default; that the lease had terminated prior to the entry of the Order for Relief; and that the lease could not be assumed as it was not property of the estate.

The Partnership contends that had there been no termination clause in the *Memphis-Friday's* lease, termination would have occurred automatically without notice and opportunity to cure. This conclusion cannot be garnered from the *Memphis-Friday's* opinion. Judge Brown did not speak to the question of lease termination in the absence of a default clause. He had no reason to do so. The disputed lease in *Memphis-Friday's* contained a default clause.

Based upon *In re Memphis-Friday's*, *Murphy*, and the unreported Tennessee Court of Appeals decision in *Pizza Pumps*, the Partnership seeks a determination by this court that a nonresidential lease entered into in Tennessee is a bilateral contract with mutually dependent covenants, and that upon a breach of a covenant the lease automatically terminates without affirmative action by the lessor. The court declines to make such a finding.

The debtor relies upon several cases to support its assertion that in the absence of a forfeiture clause in the Colonial Lease, that lease can terminate only upon the occurrence of the stated termination date.[16]

In *Greene* v. *Donnell*, 11 Tenn. App. 366 (Tenn. Ct. App. 1930), the lessor argued that a nonresidential lease was

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[16] The Partnership aptly notes that two of the cases relied upon by the debtor, *Smith* v. *Holt*, 193 S.W.2d 100 (Tenn. Ct. App. 1945) (*cert. denied* 1946) and *Barnett* v. *Dooley*, 212 S.W.2d 598 (Tenn. 1948), are distinguishable as they concern termination of residential leases. The court in *Smith* noted that "[a] tenant's failure to pay rent does not terminate or forfeit his tenancy, in the absence of a provision in the lease for such forfeiture. . . ." 193 S.W.2d at 49 Am. Jur. 2d, *Landlord and Tenant* § 1020 (1970) (footnotes omitted); *see also Schultz* v. *Ramey*, 64 N.M. 366, 328 P.2d 937 (N.M. 1958).

forfeited because the tenant failed to pay rent. The chancellor determined that the lessor could not maintain an unlawful detainer action because the lease lacked forfeiture and reentry provisions. The Court of Appeals affirmed and stated:

> There was no clause in the lease contract whereby it was provided that the lease could be determined [sic] if Greene failed to pay his rent. A failure to pay rent does not work a forfeiture.

11 Tenn. App. at 371 (citation omitted).

Am.Jur.2d states:

> A forfeiture of the leasehold may result by virture of the common law . . . or by virtue of some clause in the lease providing for forfeiture in case of breach of covenant or condition. In the absence, however, of an express stipulation or proviso to that effect, the general rule is that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages.

49 Am.Jur.2d, *Landlord and Tenant* § 1020 (1970) (footnotes omitted); *see also Schultz* v. *Ramey*, 64 N.M. 366, 328 P.2d 937 (N.M. 1958)

The Partnership has failed to demonstrate that in Tennessee the absence of a termination clause calls for automatice termination of a nonresidential lease upon the lessee's breach of a covenant. The court's research does not support the Partnership's argument. This court finds that in the absence of a terination or default clause, a nonresidential lease does not terminate automatically in Tennessee when a covenant in the lease is breached.[17]

Issue No. 3 is resolved in favor of the debtor.

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[17] The Partnership has not addressed the far-reaching implications of such a harsh forfeiture rule. To accept its analysis would mean that a lease would automatically terminate upon breach of a covenant, even if the nonbreaching party did not desire termination. A lessee who inadvertently or innocently breached a covenant would, under the Partnership's theory, terminate the lease.

VI

DEBTOR'S MOTION TO ASSUME LEASE

By its motion failed May 18, 1989, and supplemented June 9, 1989, the debtor seeks to assume the Colonial Lease. Assumption of unexpired leases is governed by § 365 of the Bankruptcy Code which provides in material part:

> Executory contracts and unexpired leases
>
> (a) [T]he trustee, subject to the court's approval, may assume or reject any . . . unexpired lease of the debtor.
>
> (b)(1) If there has been a default in an . . . unexpired lease . . . the trustee may not assume such . . . lease unless, at the time of assumption of such . . . lease, the trustee —
>
> (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
>
> (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such . . . lease, for any actual pecuniary loss to such party resulting from such default; and
>
> (C) provides adequate assurance of future performance under such . . . lease.

11 U.S.C.A. § 365 (West 1979 & Supp. 1989).

In its Motion To Assume, as amended, the debtor asserts that it is current in its obligations under the Colonial Lease except for the payment of a portion of the real property taxes. It also asserts that rental payments it is receiving from sublet portions of the real estate are sufficient to meet its obligations to the Partnership and to afford the Partnership adequate assurance of future performance. In an objection to the Motion To Assume filed May 26, 1989, the Partnership alleges that when the debtor filed its bankruptcy petition it

was not current with all of its lease obligations, specifically the payment of approximately $89,000.00 in real property taxes.

On July 20, 1989, the debtor and Partnership filed the following stipulations:

> [I]t is stipulated between the Partnership and Pioneer that, if the Lease is finally adjudicated by this court not to have terminated pre-petition, subject to any appellate court ruling to the contrary:
>
> 1. Based on the representation by Pioneer that it will pay or cause to be paid to the Partnership an amount equal to the real property taxes paid by the Partnership, plus interest at the legal rate, from the date the real property taxes were paid by the Partnership, the Partnership stipulates that the pre-petition failure to pay the subject taxes will not be asserted as a continuing basis of objection by the Partnership to assumption of the Lease by Pioneer.
>
> 2. Based on known facts presently of record in the instant case . . . [the debtor] is able to adequately assure future performance of its monetary obligations under the Lease.

The Partnership's initial objections have been met. Through the above stipulation, the § 365(b)(1)(A), (B), and (C) criteria which the debtor must meet as a prerequisite to its assumption of the Colonial Lease have been satisfied. The Partnership does not dispute the debtor's ability to pay the prepetition property taxes. Further, the Partnership stipulates that the debtor has provided "adequate assurance of future performance" under the Colonial Lease. The court is satisfied that the debtor has met the necessary prerequisites to the assumption of the Colonial Lease. The Motion To Assume will be granted.

CONCLUSION

For the reasons discussed herein, the Partnership's Automatic Stay Motion shall be denied. The debtor's Motion To Assume, as amended, shall be granted.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An appropriate order will be entered.

FILED: September 15, 1989.

BY THE COURT

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY

Debtor

ORDER

For the reasons set forth in the "Memorandum On The Cain Partnership's Motion To Lift Automatic Stay And On Debtor's Motion For Approval Of Assumption Of Executory Contract" filed this date, containing findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052, it is ORDERED as follows:

1. That the motion filed May 25, 1989, by The Cain Partnership, Ltd., seeking termination of the automatic stay to permit it to repossess and reenter the debtor's leasehold premises situated in Knox County, Tennessee, shall be and is DENIED.

2. That the debtor's "Motion For Approval Of Assumption Of Executory Contract" filed May 18, 1989, as amended June 9, 1989, shall be and is GRANTED.

3. That the debtor, upon reimbursement to The Cain Partnership, Ltd., of all unpaid prepetition real property taxes assessed against its leasehold property, plus interest at the legal rate in Tennessee, shall be and is permitted to assume that certain "Lease" between The Cain Partnership, Ltd., lessor, and Colonial Enterprises, Inc., lessee, dated

April 11, 1974, as amended by an "Amendment To Lease" dated April 1, 1977, said lease, as amended, having been assigned in part to Premiere Investment Properties, Inc., by an "Assignment Of Lease" dated July 17, 1984, said lease having been further assigned by Premiere Investment Properties, Inc., to the debtor by an "Assignment Of Lease" dated April 13, 1987, the debtor's leasehold estate containing 86.54 acres, more or less.

ENTER: September 15, 1989.

BY THE COURT

/s/ RICHARD STAIR, JR.
United States Bankruptcy Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV 3-89-0827

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed March 8, 1990)

This is an appeal from a decision of the United States Bankruptcy Court for the Eastern District of Tennessee. The controversy arose out of opposing motions, the debtor's motion for approval of its proposed assumption of a lease, and the debtor's lessor's motion for relief from the automatic stay for the purpose of repossessing the demised premises. Pursuant to the Bankruptcy Court's Pretrial Order, the parties stipulated the authenticity and admissibility of a compilation

of copies of 20 documents pertinent to the issues raised by the motions.

In its Pretrial Order, the Bankruptcy Court specified three issues to be addressed by the movants: whether the debtor has any responsibility for the use of certain real property which the debtor's lessor alleges is being used unlawfully, whether the lease was terminated prepetition in the absence of any prepetition action on the part of the lessor to terminate it, and whether the debtor's leasehold is subject to termination given the absence of an express provision in the lease agreement specifying the manner and/or means by which termination or forfeiture is to occur, or specifying any right of reentry or repossession. The other appellees, the debtor's lenders, were granted leave to intervene in light of their interests as secured lenders in the demised premises and in the debtor's continuance of its operation of the demised premises.

It is necessary to identify the parties, and to describe in some detail the transactions which affected prepetition the demised premises and the debtor's leasehold in these premises. The appellant, which the Court will refer to as "the Partnership," is the lessee of a tract of land described as consisting of approximately 95.5 acres, in Knox County, Tennessee. Since its lease is the head lease, the Partnership can be treated as if it were the owner of the demised premises for the purposes of this appeal.

The debtor, which the Court will refer to as "PISCO," is the Partnership's tenant as the result of a series of assignments beginning with an assignment made by the Partnership's original lessee. However, the position of PISCO is that it is the Partnership's tenant only with respect to a portion of the approximately 95.5-acre tract leased by the Partnership to its original lessee. PISCO takes this position because, before PISCO became the Partnership's tenant, the Partnership's original lessee first sublet a small tract to a sublessee named Omie, Inc., then assigned its leasehold in this small tract, as

well as its rights under its sublease agreement with Omie, Inc., to an assignee named Orange Tee, Inc. PISCO therefore takes the position that it is not the Partnership's tenant with respect to the small tract sublet to Omie, Inc.

The Partnership takes a contrary position, not surprisingly, that the transaction between its original lessee and Orange Tee, Inc. was either merely an assignment of the original lessee's rights under its sublease agreement with Omie, Inc., or a sublease itself. The importance of this issue rests on the fact that one of the Partnership's asserted grounds for relief from the automatic stay is that PISCO's leasehold terminated prepetition because of unlawful activity occurring on a portion of the small tract sublet to Omie, Inc.

The lease agreement between the Partnership and its original lessee, PISCO's predecessor in interest, provides in part, "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee. However, the Lessee shall remain liable to Lessor for lease payment and payment of taxes." The lease agreement is silent concerning default, forfeiture, and remedies for breach, except that it provides for the recovery of an attorney's fee "[s]hould the Lessor be forced to undertake legal action to enforce its rights upon the breach of the obligations of this lease."

United States Bankruptcy Judge Richard Stair, Jr. heard oral argument from the movants and the intervenors on July 14, 1989. Judge Stair ruled on the motions in a memorandum filed on September 15, 1989. Judge Stair denied the Partnership's motion for relief from the stay, and granted PISCO's motion under 11 U.S.C. § 365 to assume the unexpired lease. The Partnership then appealed to this Court, designating three issues on appeal.

The first designated issue is whether the transaction between the Partnership's original lessee and Orange Tee, Inc. with respect to the 5.71-acre tract was a transfer of the original lessee's rights under its sublease agreement with

Omie, Inc., or whether it was instead a "transfer of all of the rights and all of the obligations of [the original lessee] acquired and assumed by [the original lessee]" with respect to the 5.71-acre tract. The second issue is whether the language in the lease agreement between the Partnership and its original lessee, that "this lease may be assigned or the leased premises may be sublet in whole or in part," permitted a partial assignment of the leasehold, such as what PISCO contends occurred in the transaction between the original lessee and Orange Tee, Inc., relieving PISCO, as a subsequent assignee, from any responsibility for any unlawful activity on the 5.71-acre tract. The third issue designated by the Partnership is, "Does the filing of a voluntary petition in bankruptcy by a lessee pretermit any rights which such a lessee would otherwise have to notice from the lessor of the fact of a breach of the lease which occurred prior to the date on which the petition was filed?"

In briefs and at the oral argument before this Court on February 22, 1990, the appellees noted that the Partnership failed to raise in its designation of the issues on appeal the issues of whether PISCO's lease was terminated prepetition in the absence of any prepetition act on the part of the Partnership to terminate it, and whether PISCO's lease was subject to unilateral termination under Tennessee law, given the absence of an express provision in the lease agreement between the Partnership and PISCO's predecessor in interest specifying he manner and/or means by which termination or forfeiture is to occur, or specifying any right of reentry or repossession. Judge Stair dealt with these issues in his well written memorandum, and decided them against the Partnership. The Partnership argued before this Court that the Court has plenary appellate jurisdiction to decide issues other than those designated by a bankruptcy appellant.

There is authority for the Partnership's position. *In re Cohoes Industrial Terminal, Inc.*, 90 Bankr. 67, ____ (S.D.N.Y. 1988) (citation omitted). This Court believes that

the better rule is to address only the issues designated, given the notice function served by Bankruptcy Rule 8006. Nevertheless, this Court will consider these issues on this appeal, in consideration of the emphasis which Judge Stair placed on them, and of the fact that one or both of them might be dispositive of the appeal.

Judge Stair noted in his memorandum, "It is undisputed that the Partnership took no action [prepetition] to terminate the lease." The Partnership asserted that PISCO's lease was terminated because of two reasons, the asserted unlawful use of a portion of one tract referred to above, and the fact that real property taxes on the demised premises were due and unpaid on the date PISCO filed its petition for relief. Judge Stair ruled that, under Tennessee law, "[a]ffirmative conduct is required by a lessor to terminate a nonresidential lease which lacks a forfeiture clause."

Judge Stair stated the law correctly. In *Planters Insurance Co.* v. *Diggs*, 67 Tenn. 563 (1876), the property in issue was leased to one who built tenement buildings on it. The lease agreement required the tenant to pay the real property taxes on the demised premises, and stated that his failure to pay these taxes would cause a termination of the lease and a right of reentry on the part of the landlord, with a forfeiture of the tenement buildings. The tenant paid some of the taxes due late, after the expiration of the lease, and the landlord claimed a forfeiture fo the tenement buildings.

The Tennessee Supreme Court, after stating the disfavor with which courts view forfeitures, held that the forfeiture clause in the parties' agreement could only be enforced by affirmative action on the part of the landlord, i.e., reentry, while the collateral condition, the payment of the real property taxes, remained unfulfilled. *Id.* at 568-69. *Accord*, *Allen* v. *Dent*, 72 Tenn. 677, 680-81 (1880).

Modern case law is consistent.

> We hold that when a contract requires a thing to be done under penalty of forfeiture in a reasonable

> period of time under the circumstances and the parties have not agreed as to what constitutes such a time period, any declaration and notice of impending forfeiture must be clearly and unequivocally made so that the party seeking to avoid a forfeiture will have the opportunity to cure the forfeiture by complying with the other's demands or to seek injunctive relief to contest the unilateral decision by one of a "reasonable period under the circumstances."

Turner v. *Yow*, 657 S.W.2d 94, 97 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1983). "Conditions not included in the notice of default cannot properly serve as a basis for forfeiture." *Hooton* v. *Nacarato GMC Truck, Inc.*, 772 S.W.2d 41, 45 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1989).

If affirmative action is required of a landlord to enforce a written forfeiture clause, then *a fortiori* some sort of affirmative action, at least a demand, is required before a court will allow a landlord to terminate an unexpired lease for a breach of a covenant when the lease agreement contains no forfeiture or other default clause. If a tenant under a lease agreement which contains a forfeiture clause is entitled to notice of impending forfeiture and of the breaches asserted to justify the forfeiture, then a tenant under a lease agreement which contains no forfeiture or other default clause is entitled to such notice. These rules are grounded on the policy that a forfeiture should not be enforced without providing to the party subject to the forfeiture an opportunity to cure any nonperformance which might otherwise justify the forfeiture. This policy is stronger in the case of an agreement which is silent concerning forfeiture or any other remedy for default, since the party subject to the forfeiture does not receive from the language of the agreement any warning of the possibility of the forfeiture.

The case law relied upon by the Partnership is inapposite. In *Pizza Pumps of America, Inc.* v. *Krispy Kreme Doughnut*

Corporation, 11 T.A.M. 52-13 (Tenn. App. 1986), the parties' lease agreement, as construed by the Court of Appeals, provided in part, "[T]his Lease may be forfeited and thereby become null and void at the option of the lessor, and the said Lessor may immediately . . . reenter the said Premises . . . and repossess the same . . ." upon a default in the payment of rent. The lease agreement stated unequivocally that no extensions of time within which to pay rent would be permitted.

The lease agreement in *In re Memphis-Friday Associates*, 88 Bankr. 830 (Bankr. W.D. Tenn. 1988), stated a cure period applicable in the event of default in the payment of rent, and provided that the lessor could, after the expiration of the cure period without cure, serve a notice of termination on the lessee, specifying the date of termination. The lessor complied with this notice provision in the *Memphis-Friday Associates* case. The Bankruptcy Court held that the lessor, having complied with the notice provision, did not have to reenter, to commence a suit for possession, or obtain a writ of possession in order to terminate the lease. The Bankruptcy Court did not hold that it was unnecessary to give the lessee notice of the termination.

The issue of notice was not reached in *Murphy* v. *Reynolds*, 212 S.W.2d 686, 690 (Tenn. App.), *cert. denied*, *id.* (Tenn. 1948). The issue was neither pleaded nor otherwise raised in the trial court, and the Court of Appeals refused to consider it.

Judge Stair therefore ruled correctly that PISCO's leasehold had not been terminated on or before the date of PISCO's filing of its petitin for relief, because of the lack of any affirmative action on the part of the Partnership to terminate it. The Partnership argues, however, that if Judge Stair stated the general rule accurately, which the Partnership does not concede, he overlooked an exception which applies to cases like this, in which the tenant was in default at the time of the filing of its petition for relief, and the landlord

was prevented by the tenant's bankruptcy from giving any notice or from making any demand. According to the Partnership,

> [T]he filing of the bankruptcy petition by a lessee who, before filing, had defaulted actuates the common law of Tennessee which requires that the relationship between the bankrupt lessee and the lessor be interpreted, in retrospect, as if there had been an explicit agreement between them that, upon default, the lease, then and there, terminated.

Appellant's Reply to the Brief of Appellee, Fleet National Bank [doc. 11] at 18.

The appellant relies on *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), which, as construed by the Tennessee Supreme Court in *Barnett* v. *Dooley*, 186 Tenn. 611, ____, 212 S.W.2d 598, 600 (1948), is asserted to stand for an exception to the common-law rule requiring demand in order to effect a forfeiture of a lease for default in the payment of rent in any case in which the tenant files a petition in bankruptcy before the expiration of the time within which demand must be made, because "the law does not require an idle gesture." It is questionable whether the *Barnett* v. *Dooley* reading of *Elder* is correct, since what happened in the older case was that the tenant filed her petition in bankruptcy, and her attorney immediately notified her landlady that the rent due on the date of the filing of the petition would not be paid. Furthermore, the Supreme Court in *Elder* stated a contractual ground for its decision, separate from the fact of the tenant's bankruptcy:

> The lease provided that in case of default in payment of rent thirty days the lessor could declare the lease at an end and take possession of the property at once. That provision of the lease gave the lessor the right to terminate it upon the lesseee's failure to pay the rent. The agreement of the parties operated to end the term

> upon non-payment of rent without the ceremony preceding re-entry and forfeiture.

Elder v. *Epperson*, 173 Tenn. 219, ____, 116 S.W.2d 1015, 1017 (1938) (citations omitted).

Accepting the *Barnett* v. *Dooley* reading of *Elder* as an accurate statement of Tennessee law, however, the Court is faced with the question whether this pre-Bankruptcy Code law continues to be enforceable in light of the supreme federal law expressed in 11 U.S.C. § 365(c)(3) and related provision, which allow a debtor-in-possession to assume an unexpired lease of nonresidential real property unless the lease "has been terminated under applicable nonbankruptcy law prior to the order for relief." *See also* § 365(b)(2)(B), which effectively renders a default-upon-bankruptcy clause unenforceable.

"Section 365 of the Code only gives a debtor the right to assume an executory contract. If a contract has been terminated pre-bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law." *Moody* v. *Amoco Oil Company*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984) (citations omitted).

The Court is able to avoid this possible conflict between Tennessee real property law and federal bankruptcy law if Judge Stair concluded correctly that Tennessee law does not permit the unilateral termination of a lease for a breach of one or more lease covenants in the absence of a termination or forfeiture clause in the lease agreement. If this conclusion is correct, then the *Elder* v. *Epperson* exception to the common-law rule cannot be of any help to the Partnership, because it is undisputable that the lease agreement between the Partnership and PISCO's predecessor in interest is silent concerning default, forfeiture, and remedies for breach.

And demand or notice of termination of the lease made by the Partnership, whether or not prevented by PISCO's bankruptcy, would indeed have been ineffective to work a

forfeiture of this lease. In the absence of a lease agreement clause providing for the termination of the lease, even a failure to pay rent cannot work a forfeiture of the lease. *Greene* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, *id.* (Tenn. 1930) (citation omitted). This is consistent with the prevailing rule in American law:

> In the absence . . . of an express stipulation or proviso to that effect, the general rule is that the breach by the lessee of the covenants or stipulations on his part contained in the lease does not work a forfeiture of the term, and that the lessor's remedy is by way of a claim for damages. In the absence of a stipulation for a forfeiture, a lessee does not forfeit his term by the non-payment of rent or of taxes which he has covenanted to pay. Nor will a forfeiture be decreed because of a violation of a covenant not to sublet or assign, or even because of an illegal use of the demised premises, although any of such things may by the terms of the lease be made grounds of forfeiture. . . .

49 AM. JUR. 2D, *Landlord and Tenant* § 1020 (1970) (footnotes omitted).

This conclusion means that the third issue on appeal designated by the Partnership, whether the commencement of a voluntary case in bankruptcy by a lessee "pretermit[s] any rights which such a lessee would otherwise have to notice from the lessor of the fact of a breach of the lease which occurred [prepetition]," is itself pretermitted. It is also unnecessary for this Court to decide the sublease/assignment issue regarding the 5.71-acre tract, since whether or not PISCO has any responsibility as the Partnership's tenant for any unlawful activity which is occurring on this small tract, neither such unlawful activity nor any failure to pay real property taxes when due could have worked a forfeiture of this lease in the absence of PISCO's bankruptcy. Applying a *de novo* standard of review to Judge Stair's conclusions, this

Court finds them correct, and will affirm the decision of the Bankruptcy Court.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. CIV 3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

ORDER
(Filed March 26, 1990)

In accordance with the Court's Memorandum Opinion filed simultaneously with this Order, the Order entered September 15, 1989 by the United States Bankruptcy Court for the Eastern District of Tennessee in the debtor's case in bankruptcy, denying The Cain Partnership, Ltd.'s motion for relief from the automatic stay, and granting the debtor's motion to assume the lease evidenced by the lease agreement dated April 11, 1974 (as subsequently amended) between The Cain Partnership, Ltd. and Colonial Enterprises, Inc., is AFFIRMED.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession,

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed May 23, 1990)

This is an appeal from a decision of the United States Bankruptcy Court for the Eastern District of Tennessee. The case is before the Court for its consideration of the appellant's motion for amendment of judgment and/or petition for rehearing. [Doc. 21.] For the reasons stated below, the Court will deny this motion.

The appellant requested in its motion that the Court hear oral argument on the motion, but the Court finds this unnecessary in light of the proceedings in this case to date. The appeal resulted from the Bankruptcy Court's decision under 11 U.S.C. § 365 (West 1979 and 1990 supp.) to allow the debtor-in-possession, Pioneer Investment Services Company ("PISCO"), to assume an unexpired lease, and to deny the motion of the appellant landlord, The Cain Partnership, Ltd. ("the Partnership"), for relief from the automatic stay im-

posed by 11 U.S.C. § 362 (West 1979 and 1990 supp.) for the purpose of taking possession of the demised premises. The parties briefed the issues on appeal more than adequately.

This Court heard oral argument in this case on February 22, 1990. The Court ruled on the issues presented in a Memorandum Opinion and Order filed on March 8, 1990 (Docs. 19 and 20.] The Partnership filed the motion under consideration soon after, on March 19. The Partnership accompanied its motion with a brief more than 30 pages long [doc. 21A], a supplemental brief 14 pages long [doc. 22], and an appendix containing 465 pages of copies of various judicial opinions and other authorities. [Doc. 23.]

Almost all of the Partnership's argument is reargument of issues and contentions presented to the Court during the first round of briefing and at the oral argument. The Court is of the opinion that it gave adequate consideration to these issues and contentions, and reached a correct decision in its Memorandum Opinion and Order filed earlier. Therefore, the Court will deny the Partnership's motion to the extent that it seeks reconsideration of issues already briefed.

The Partnership also argues that the Court should amend its earlier opinion to delete the holding that, before a landlord can terminate unilaterally a lease for a tenant's breach of a covenant, such as a covenant not to make any unlawful use of the demised premises, there must be a termination or forfeiture clause in the parties' lease agreement. The Partnership argues, without conceding the correctness of this holding, that it was unnecessary to the Court's decision of this case, and that it will cause the Partnership difficulties in some State-court litigation with other parties interested in a portion of the same demised premises in issue here.

The Bankruptcy Court identified this issue, the necessity of a termination or forfeiture clause in a lease agreement under the circumstances presented in this case, as one of three issues to be addressed by the parties. The Partnership, the appellant, did not state it under Bankruptcy Rule 8006 as an issue on appeal, but argued at the oral argument that this Court has plenary appellant jurisdiction to consider all issues.

This Court decided the issue because it was an important part of the Bankruptcy Court's decision, and because it had the potential to be dispositive of the appeal.

Furthermore, by holding as it did, the Court sought to avoid a possible conflict between Tennessee law as expressed in *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), as construed in *Barnett* v. *Dooley*, 186 Tenn. 611, 212 S.W.2d 598 (1948), and the supreme federal bankruptcy law permitting the debtor-in-possession's assumption of an unexpired lease of nonresidential real property in the absence of a prepetition termination under applicable nonbankruptcy law. *See* 11 U.S.C.A. § 365(c)(3) (1990 supp.). The Partnership argued that, if it was required under Tennessee law to take some prepetition action to terminate PISCO's lease, it was relieved from this requirement by PISCO's filing of its petition for relief under chapter 11 of the Bankruptcy Code. The Court held that the Partnership could not rely upon *Elder* v. *Epperson*, *supra*, when the parties' lease agreement contained no termination or forfeiture clause.

The Court is of the opinion that it decided this issue correctly, and that there is no good reason to amend its opinion filed earlier in this case.

The Court will consider one more argument made by the Partnership, which was not advanced before. The Partnership argues that Tennessee Code Annotated §§ 66-7-105 (1982 repl. vol.) and 29-3-101(a) (1980 repl. vol.) worked a forfeiture of the lease without any action on the part of the Partnership. To quote from the Partnership's brief,

> [I]t goes without saying that, where a lease terminates by statute because of unlawful use, prior notice by the lessor is alleviated. In fact, prior notice is impossible. Such forfeitures occur because of unlawful uses prohibited by statute, and, unless the statute makes provision for an opportunity to cure, the termination is final and automatic.

[Doc. 21A, pp. 26-27.]

The problem with the Partnership's argument is that the statutes cited do not go as far as the Partnership would have them go. T.C.A. § 66-7-105 declares leases of real estate used for certain purposes, such as the sale of obscene material, against public policy and not enforceable, and goes on to say that any lessor of real estate for one of the prohibited purposes "shall not be entitled to use the courts or legal processes of this state to enforce said lease or rental contract or to collect rentals or any other consideration thereon." Aside from the obvious facts that this is a case in which a lessee, not a lessor, seeks to assume the lease, and that neither this Court, sitting as a bankruptcy appeals court, nor the Bankruptcy Court is a Tennessee court, it must be noted that nothing in the statute causes a lease to be terminated or forfeited automatically, without any action by either party to invoke the statute. It appears from the statutory language that the General Assembly referred to the legal enforceability of such a lease, rather than to the termination or forfeiture of it, because the purpose of the statute is to prevent one from engaging in one or more of the prohibited acts indirectly, i.e., by demising his or her premises to another for the purpose of engaging in one or more of the same prohibited acts.

The second statute cited, T.C.A. § 29-3-101(a)(1), helps the Partnership even less. It defines the terms "nuisance" and "lewdness" for the purposes of T.C.A. Title 29, ch. 3, which concerns the abatement of nuisances. This chapter sets out a specific procedure to be followed in seeking the abatement of a nuisance. *See, e.g., State ex rel. Webster* v. *Daughtery*, 530 S.W.2d 81 (Tenn. App.), *cert. denied, id.* (Tenn. 1975). The remedy provided is abatement, not the termination or forfeiture of the lease. T.C.A. § 29-3-110.

"Forfeitures are not favored by the law. Statutes purporting to authorize forfeiture are strictly construed and justify permanent confiscation only when the facts fall within both the letter and spirit of the statute." *Blackmon* v. *Norris*, 775 S.W.2d 367, 369 (Tenn. App.), *permission to appeal denied, id.* (Tenn. 1989) (citations omitted) (discussing a Department

of Corrections policy providing for the forfeiture of money in the possession of an inmate).

The Partnership argues somewhat heatedly in its brief in support of its motion now under consideration that a hypothetical result of the Court's holding is, in a case in which the pertinent lease agreement contains no termination or forfeiture clause, and in which law enforcement officers having jurisdiction fail or refuse to act, that a landlord is powerless to interfere with, to prevent, or to terminate an unlawful use of demised premises. Yet T.C.A. § 29-3-102 states that a suit for the abatement of a nuisance may be brought upon the relation of 10 or more citizens and freeholders, and § 29-3-114 gives a single plaintiff in a suit to recover special damages for a nuisance standing to petition for the abatement of it.

Neither of the statutes relied upon by the Partnership, then, worked an automatic termination or forfeiture of PISCO's lease. Perhaps the Partnership could have used one, or both, to achieve that end, but it did not do anything prepetition to initiate any proceeding by which to terminate the lease. Neither § 66-7-105 nor § 29-3-101 provides a ground for changing the Court's earlier ruling that PISCO's lease was not terminated when it filed its petition for relief because the Partnership had not taken any affirmative, prepetition action to terminate it.

This is consistent with some of the authorities included in the addendum filed by the Partnership. [Doc. 23.] In *In re Club 99, Inc.*, 82 Bankr. 166 (D.D.C. 1988), the lease agreement provided that a failure to comply with any covenant (the lease agreement contained a covenant against use for disorderly or unlawful purposes or for any illegal business) was a default, upon which the landlord had an option to terminate the lease at any time. Some time before the tenant debtor filed its petition for relief, the landlord commenced a proceeding in the District of Columbia Superior Court to recover possession of the demised premises for breach of this covenant. Through no fault of the landlord, the Superior Court continued the hearing of this proceeding several times,

so that it was not completed before the commencement of the tenant's case in bankruptcy. The District Court held that the lease had been terminated prepetition under applicable non-bankruptcy law (*i.e.*, District of Columbia law) because there was both a breach of a lease covenant and a manifestation by the landlord of an intent to terminate the lease because of the breach.

In *Schwartz* v. *McQuaid*, 214 Ill. 357, ____, 73 N.E. 582, 584 (1905), the Illinois Supreme Court stated, "While it is true that [the lessee] used [the demised premises] for an illegal purpose, and that fact might authorize the lessor to avoid the lease, yet the lessee would be entitled to his day in court before he could be deprived of the benefits of his lease." In *Voght* v. *State*, 124 Ind. 358, ____, 24 N.E. 680, 681-82 (1890) (citations omitted), the Indiana Supreme Court, in the course of discussing how a landlord might escape statutory criminal liability for renting premises used for gambling, stated, "The mere fact that a tenant uses premises for an unlawful purpose does not of itself avoid the lease, but the landlord may apply to a court of equity to restrain the tenant, and to avoid or forfeit the lease."

Planters Insurance Company v. *Diggs*, 67 Tenn. 563, 568 (1876), continues to be an authoritative statement of the Tennessee law "that the forfeiture [of a lease for breach of a lease covenant] is to be enforced at the option of the lessor, and by an affirmative act on his part, that is by re-entry for such purpose, based on failure to perform or breach of the conditions, and do (sic: does) not take effect until this is done." Neither *Bank of Commerce & Trust Co.* v. *Burke*, 135 Tenn. 19, 185 S.W. 704 (1916), nor *Heart* v. *East Tennessee Brewing Company*, 121 Tenn. 69, 113 S.W. 364 (1908), cited by the Partnership, is authority to the contrary. In the former case, the landlord was barred from collecting rents by the demise of the premises for an illegal purpose, the operation of a saloon. In the latter, the landlord was similarly denied the right to recover rents when the premises were demised for the express purpose of operating a saloon, and this purpose became illegal during the term of the lease.

Therefore, assuming only for the purposes of the Partnership's argument that, when PISCO filed its petition for relief, unlawful activity was occurring on a part of the Partnership's land for which PISCO was responsible, the Partnership is not entitled to invoke any such unlawful activity to prevent PISCO's assumption of its lease, because the Partnership did not take any prepetition action to manifest its intent to terminate the lease for breach of the covenant against unlawful use or activity. *Elder* v. *Epperson*, 173 Tenn. 219, 116 S.W.2d 1015 (1938), and *Barnett* v. *Dooley*, 186 Tenn. 611, 212 S.W.2d 598 (1948), do not enable the Partnership to treat any attempted postpetition termination of this lease as a prepetition termination for the purposes of § 365(c)(3) of the Bankruptcy Code. The *Elder* v. *Epperson* exception to the common-law rule requiring a demand for unpaid rent on the day it is due does not allow a creditor to do nothing prepetition about a claimed breach of a collateral covenant in a lease, then assert the alleged breach for the first time in the tenant's case in bankruptcy.

In light of this disposition of the Partnership's motion, it is unnecessary to address whether the fact that PISCO, after the filing of this Court's earlier Memorandum Opinion and Order, obtained superpriority secured financing under 11 U.S.C. § 364 (West 1979 and 1990 Supp.), without opposition or an appeal by the Partnership, so change the circumstances in this case as to render the Partnership's motion moot. [See docs. 25, 25A, 26, 27 and 28.] The Court will deny the Partnership's motion for amendment of judgment and/or petition for rehearing.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY, Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD., Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al., Appellees.

ORDER
(Filed May 23, 1990)

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, the Court finds The Cain Partnership, Ltd.'s motion for amendment of judgment and/or petition for rehearing [doc. 21] not well taken, and it is DENIED.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

Case No. 3-89-01058

In re

PIONEER INVESTMENT SERVICES COMPANY
Debtor

ORDER
(Received November 5, 1990)

For the reasons set forth in the court's memorandum opinion dictated orally from the bench on October 31, 1990, the "Motion Of The Cain Partnership, Ltd., Pursuant To *Bankruptcy Rule* 9024 And *Federal Rules of Civil Procedure*, Rule 60(b)(4), To Vacate The Orders Entered On September 15, 1989 Denying The Motion Of The Cain Partnership, Ltd. To Lift The Stay And Permitting Debtor To Assume The Colonial Lease" filed by the Cain Partnership, Ltd., on October 5, 1990, is DENIED.

SO ORDERED.

ENTER: October 31, 1990
BY THE COURT

/s/ RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY
JUDGE

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Case No. 3-89-01058

IN RE:

PIONEER INVESTMENT SERVICES CO.,
A/K/A PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

MEMORANDUM OPINION
October 31, 1990
(Received November 16, 1990)

BEFORE THE HONORABLE RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

FOR THE DEBTOR:
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FOR THE CAIN PARTNERSHIP, LTD.:
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FOR FIRST TENNESSEE BANK:
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FOR FLEET NATIONAL BANK:
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FOR FIRST NATIONAL BANK OF LOUISVILLE:
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FOR PAUL D. POWSNER:
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First Tennessee Bank Building
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FOR THE UNITED STATES TRUSTEE:
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FOR THE CREDITORS' COMMITTEE:
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FOR JOHN WEAVER, TRUSTEE:
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FOR GENEFIN S.A.:
RICHARD A. SEDGLEY, ESQ.
7212 Kingston Pike
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MERILYN B. DUNN, COURT REPORTER
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(615) 637-4087

[3] *THE COURT*: I have before me two motions filed by The Cain Partnership Limited. I will deal with these motions independently. The Cain Partnership Limited filed a motion on October 5, 1990, pursuant to Federal Rule of Civil Procedure 60(b)(4), incorporated into Federal Rule Bankruptcy Procedure 9024, seeking to set aside an order of this Court entered September 15, 1989. This order denied the partnership's motion filed May 25, 1989, seeking termination of the automatic stay of 11 U.S.C. § 362(a) to permit it to repossess and reenter the debtor's leasehold premises consisting of approximately 86.54 acres situated in Knox County, Tennessee. The September 15, 1989 order also granted the debtor's motion filed May 18, 1989, that it be permitted to assume that certain lease between the partnership, as lessor, and Colonial Enterprises, Inc., as lessee, dated April 11, 1974, as amended April 1, 1977, said lease as amended having been assigned in part to Premiere Investment Properties, Inc. on July 17, 1984, said lease having been further assigned by Priemiere Investment Properties, Inc. to the debtor on April 13, 1987. The partnership requests the Court to vacate its September 15, 1989 order which has been affirmed by the District Court and is presently on appeal to the United States Court of Appeals for the Sixth [4] Circuit.

In support of its Rule 60(b)(4) motion, the partnership contends that the order is void and should be vacated because the Bankruptcy Court lacked the subject matter jurisdiction to enter an order affecting the leasehold property. Fleet National Bank and the debtor filed memorandums in opposition to the partnership's Rule 60(b)(4) motion. The partnership correctly relies upon *Flynt* v. *Brownfield, Bowen & Bally*,726 F. Supp. 1106, a 1989 District Court decision out of the Southern District of Ohio, in stating that the Sixth Circuit permits lower courts to consider Rule 60(b) motions pending an appeal. The lower court, however, possesses only limited or residual jurisdiction to consider a Rule 60(b) motion and cannot grant a party a new trial or reconsider the merits of its order. The Sixth Circuit has stated: "As a general rule the filing of a notice of appeal divests the district court of jurisdic-

tion and transfers jurisdiction to the court of appeals. This, however, is not an inflexible rule. . . . Thus this court has consistently held that a district court retains jurisdiction to proceed with matters that are in aid of the appeal." *Cochran* v. *Birkel*, 651 F.2d 1219 at 1221. That is a 1981 decision out of the Sixth Circuit and I have omitted citations in support of the quote.

[5] The holding in *Cochran* is consistent with the traditional rule that the lower court is divested of jurisdiction except to take action in aid of an appeal. *See Rucker* v. *United States Department of Labor*, 798 F.2d 891, a 1986 Sixth Circuit decision; *First National Bank* v. *Hirsch*, 535 F.2d 343, a 1976 Sixth Circuit decision; and *Berndt* v. *Stinson*, 562 F. Supp. 28, a 1982 District Court decision out of the Eastern District of Tennessee, in which the Sixth Circuit dismissed an appeal, 708 F.2d 721.

A Rule 60(b) motion dealing only with the jurisdiction of the Court to enter the challenged order may be considered to be in aid of the appeal and, therefore, resolved by the Trial Court notwithstanding a filing of a notice of appeal. *See Willie* v. *Continental Oil Company*, 746 F.2d 1041, a 1984 Fifth Circuit decision. The Trial Court cannot, however, reconsider the merits of its order. *Schechter* v. *McTigue* (In re Trempe), 1990 Westlaw, 70043, a May 10, 1990 decision out of the District Court for the Northern District of Illinois.

By its motion, the partnership attacks the subject matter jurisdiction of the Bankruptcy Court to enter the September 15, 1989 order which allowed the debtor to assume the disputed Colonial lease. This Court had subject matter jurisdiction to determine the partnership's automatic stay motion and it likewise had [6] jurisdiction to determine the debtor's motion to assume the lease. The debtor was in possession of the leasehold property pursuant to the provisions of the April 11, 1974 lease, as amended, between the partnership and Colonial as assigned to it on April 13, 1987. The partnership stipulated the authenticity and admissibility of numerous documents, including its April 11, 1974 lease with Colonial, as amended, and the various assignments through which the

debtor became the lessee under the lease. The partnership further stipulated that it took no action prior to the filing of the debtor's Chapter 11 petition to terminate the Colonial lease.

The Bankruptcy Court's jurisdiction is defined under 28 U.S.C. § 1334 and 28 U.S.C. § 157. Section 1334(a) confers original and exclusive jurisdiction over all cases under Title 11 in the District Court. Section 1334(b) confers original but not exclusive jurisdiction in the District Court of all civil proceedings arising under or related to cases under Title 11. Section 157 of Title 28 allows each District Court to "provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." Section 157(b) empowers Bankruptcy Judges to enter [7] appropriate orders and judgments in all core proceedings. Core proceedings are those intrinsic to the adjustment of debtor-creditor relationships involved in bankruptcy relief. *In re Marine Iron & Shipbuilding Company*, 104 B.R. 976, a 1989 District Court decision out of the District of Minnesota.

Section 157(b)(2), at Paragraphs G and M, respectively, expressly provides that core proceedings include "motions to terminate, annul, or modify the automatic stay" and "orders approving the use or lease of property." The automatic stay and lease assumption issues before the Court which led to entry of the September 15, 1989 order are undisputedly core issues cognizable by the Bankruptcy Judge under 28 U.S.C. § 157(b). Clearly, this Court had subject matter jurisdiction to enter its order denying the partnership's motion for stay relief and granting the debtor's motion to assume the Colonial lease.

In *Trempe*, previously cited, a creditor filed a motion seeking to vacate a default judgment as void pursuant to Rule 60(b)(4) contending that the Court did not have subject matter jurisdiction to enter the judgment. The trustee had obtained a default judgment on a suit to recover a preferential transfer. The creditor alleged, as does the partnership, that

the [8] Bankruptcy Court lacked subject matter jurisdiction because the property in question was not property of the estate. The District Court held that the Bankruptcy Court had jurisdiction over the parties and subject matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b) since the action was a core proceeding. The District Court stated: "The jurisdictional question for the bankruptcy court is whether the trustee brought an action to avoid a preference. The question whether property is property of the estate goes to the merits of the complaint."

The jurisdictional question mandated by 28 U.S.C. § 157(b)(2) is resolved by a two-fold inquiry insofar as the instant proceeding is concerned: One, did the debtor file its motion pursuant to 11 U.S.C. § 365 for approval of the assumption of the Colonial lease; two, did the partnership file its motion for automatic stay relief pursuant to 11 U.S.C. § 362. This Court, through its September 15, 1989 order, answered these questions in the affirmative. I made a specific finding in the memorandum filed in support of my September 15, 1989 order that the matters raised by the partnership's automatic stay motion and the debtor's motion to assume the Colonial lease were core proceedings. This Court acted within the jurisdictional scheme defined under 28 U.S.C. § 1334 and 28 U.S.C. § 157.

[9] Through its current motion, the partnership argues that the Colonial lease was not part of the debtor's estate as a result of its pre-petition termination and, therefore, the motions resolved by the September 15, 1989 order did not constitute core proceedings. The partnership argues that core proceedings must involve property of the estate to confer jurisdiction upon the Bankruptcy Court. The partnership contends that the debtor was not in possession of the leasehold estate. It argues that legal title to the leasehold estate had been conveyed by the debtor by a deed of trust to its various lenders and that therefore the debtor cannot be viewed to have been or to be in possession of the premises such that the Bankruptcy Court could exercise jurisdiction. This argument

ignores the beneficial interest of the debtor in the property and its actual physical possession and control thereof.

11 U.S.C. § 541(a)(1) defines property of the estate broadly as "all legal or equitable interests of the debtor in property as of the commencement of the case." The Bankruptcy Court undisputedly has jurisdiction to determine what is property of the estate. *See In re Gull Air, Inc.*, 890 F.2d 1255, a 1989 First Circuit case; *In re Prudential Lines, Inc.*, 107 B.R. 832, a 1989 Bankruptcy Court decision out of the Southern District of New York; *In re Tudor Motor Lodge Associates*, 102 B.R. 936, [10] a 1989 Bankruptcy Court decision out of the District of New Jersey.

Since the debtor asserted an interest in the Colonial lease, the Bankruptcy Court had subject matter jurisdiction to determine the merits of the partnership's automatic stay motion and the debtor's motion for approval to assume the Colonial lease. *See In re Xonics, Inc.*, 813 F.2d 127, a 1987 Seventh Circuit decision. Similarly, the Bankruptcy Court had jurisdiction to determine whether or not the Colonial lease had been terminated pre-petition. *See generally In re Waterkist Corporation*, 775 F.2d 1089, a 1985 Ninth Circuit decision; *In re Acorn Investments*, 8 B.R. 506, a 1981 Bankruptcy Court decision out of the Southern District of California; and *In re Aries Enterprises, Limited*, 3 B.R. 472, a 1980 Bankruptcy Court decision out of the District of Columbia.

The question of whether the lease had terminated pre-petition and/or was property of the estate goes to the merits of the motions originally filed by the partnership and the debtor which led to this Court's September 15, 1989 order. *See generally Franklin Computer Corporation*, 60 B.R. 795, a 1986 Bankruptcy Court decision out of the Eastern District of Pennsylvania, and *In re Nettie Lee Shops of Bristol, Inc.*, 49 B.R. 946, a 1985 Bankruptcy Court decision out of the Western District of [11] Virginia.

The partnership's motion, ostensibly filed under Rule 60(b)(4), appears in reality to be merely an effort to reargue

and restate its theory that the debtor's lease was terminated pre-petition and was, therefore, not property of the estate. The motion improperly challenges this Court's prior determination that the lease had not been terminated pre-petition and was, therefore, subject to assumption by the debtor. The partnership's Rule 60(b)(4) motion raises the identical issues resolved by the Court through its September 15, 1989 order. The partnership's Rule 60(b)(4) motion seeking to vacate the September 15, 1989 order for lack of jurisdiction is without merit and will be denied.

The second matter before me involves a motion filed by The Cain Partnership Limited on September 28, 1990 requesting the Court to set aside its order entered March 1, 1990 authorizing the debtor to incur secured debt and/or to enter into a post-petition financing agreement with Fleet National Bank. Under the terms of the March 1, 1990 order entered pursuant to 11 U.S.C. § 364(c), the debtor was authorized to enter into a post-petition loan agreement with Fleet which allowed the debtor to borrow sums not in excess of $847,000. The debtor was further authorized to execute [12] appropriate documents to effectuate the loan or loans, including loan documents, notes, loan agreements, and deeds of trust. Under the terms of the March 1, 1990 order, Fleet's post-petition loans were to be secured by first priority liens on the debtor's leasehold estate. The partnership, through the filing of its September 28, 1990 motion requests relief under Federal Rule Civil Procedure 60(b)(1) and/or (4) and/or (5) and/or (6), all of which are incorporated into Federal Bankruptcy Rule Procedure 9024. Fleet filed a response in opposition to the partnership's motion on October 11, 1990.

Circumstances leading to the entry of the March 1, 1990 post-petition financing order, while repetitious to what I have already stated in connection with the earlier motion, are as follows. On September 15, 1989, the Court entered the order authorizing the debtor to assume that certain lease between The Cain Partnership Limited, lessor, and Colonial Enterprises, Inc., lessee, dated April 11, 1974, as amended April 1, 1977, said lease as amended having been assigned in part to

Premiere Investment Properties, Inc. on July 17, 1984, said lease having been further assigned by Premiere Investment Properties, Inc. to the debtor on April 13, 1987. On February 2, 1990, the debtor filed a motion pursuant to 11 U.S.C. § 364(c) seeking authorization to incur secured [13] debt and enter into the post-petition financing arrangement with Fleet. An amendment to the debtor's financing motion was filed February 8, 1990. Notice of the filing of the debtor's § 364(c) motion as amended and of a hearing thereon held February 21, 1990 was provided all creditors and parties in interest, including The Cain Partnership. The partnership did not object to the motion. On March 1, 1990, the Court entered the order granting the debtor's motion. No appeal of the March 1, 1990 order was taken.

Fleet, in its memorandum in opposition to the partnership's motion, states that the post-petition loan authorized by the order was closed on March 29, 1990. It further avers that in accordance with the terms of the March 1, 1990 order, it has advanced funds to the debtor totaling more than $700,00. This loan, according to Fleet, is, pursuant to the financing order, secured by a lien prior in right and entitlement to all other existing liens on and claims against the leasehold estate. The Court accepts Fleet's averments as true and, indeed, these representations are not disputed by the partnership.

The partnership, six months after entry of the March 1, 1990 post-petition financing order, asserts that the order was based on a mistake of law. It contends it is, therefore, now entitled to have the March 1, 1990 order set aside. Bankruptcy Code § 364(e) provides: [14] "The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and the incurring of such debt, or the granting of such priority or lien, were stayed pending appeal." The Bankruptcy Court cannot reverse an authorization to obtain credit or

incur debt unless the lender did not act in good faith. *See Kham and Nate's Shoes No. 2, Inc.* v. *First Bank of Whiting*, 908 F.2d 1351, a 1990 Seventh Circuit decision. *See also In re Revco D.S., Inc.*, 901 F.2d 1359, a 1990 Sixth Circuit decision; *In re Ellingsen MacLean Oil Co., Inc.*, 834 F.2d 599, a 1987 Sixth Circuit decision.

In *Kham and Nate's Shoes No. 2*, the United States Court of Appeals for the Seventh Circuit stated: "There is an intermediate step, suggested by § 364(e), which provides that the reversal or modification of a financing order on appeal 'does not affect the validity of any debt so incurred, or any priority or lien so granted, to an entity that extended such credit in good faith.' In other words, a lender that extends credit in reliance on a financing order is entitled to the benefit of that [15] order, even if it turns out to be legally or factually erroneous. Although § 364(e) speaks only of modification on appeal, it instantiates the principle that bankruptcy judges may make binding commitments to give priority to new credit. If creditors fear that the rug will be pulled out from under them, they will hesitate to lend. So § 364(e) and companion provisions . . . disable courts from backtracking on promises in the absence of bad faith, which is a very narrow exception. . . . A bankruptcy court's modification of its own orders poses the same risks as does reversal on appeal. Accordingly, although § 364(e) does not apply by its own terms, its principle applies through the law of the case. A judge lacks the power to undo the priority granted by a financing order without first finding that the creditor acted in bad faith." That quotation is found at 908 F.2d at 1355, and I have omitted supporting authority.

The rationale behind the protection afforded lenders by Section 364(e) on appeal of a post-petition financing order is equally applicable to a request for relief under Rule 60(b). Rule 60(b) should not be a vehicle utilized to circumvent the clear intent of Section 364(e). A post-petition loan properly authorized under Section 364(a), (b), or (c) cannot be affected by a subsequent reversal or modification by the Bankruptcy Judge. [16] *See In re Blumer*, 66 B.R. 109, a 1986

decision out of the Ninth Circuit Bankruptcy Appellate Panel, which was affirmed without published opinion at 826 F.2d 1069.

The good faith requirement of Section 364(e) prohibits such a reversal or modification. Its principle holds true even if the financing order was entered erroneously or as a result of a mistaken view of the law. *See Kham and Nate's Shoes No. 2*, 908 F.2d at 1355. As noted by one Bankruptcy Court: "[T]here is an overriding interest in maintaining the integrity of the judicial process. The Court's orders approving the post-petition financing stipulations conferred a priority to [the bank] ahead of all administrative claims. The bank advanced funds to the trustee in reliance upon those orders. The Chapter 11 process would be undermined if this Court were to, in effect, undo those orders by placing the administrative claims of the creditors' committee ahead of the superpriority which [the bank] bargained for." *In re American Resources Management Corp.*, 51 B.R. 713 at 722, a 1985 Bankruptcy Court decision out of the District of Utah.

In its Rule 60(b) motion, the partnership has not alleged that Fleet acted in bad faith in extending a post-petition secured loan to the debtor. Nevertheless, it is clear that the only ground for setting aside or modifying an order entered pursuant to [17] Section 364(c) is lack of good faith. *In re Revco D.S., Inc.*, 901 F.2d 1359, which I previously cited; *In re Graphic Arts Lithographers, Inc.*, 71 B.R. 774, a 1987 decision out of the Ninth Circuit Bankruptcy Appellate Panel; *In re Ellingsen MacLean Oil Company*, 834 F.2d 599. Good faith has been defined by the Sixth Circuit as "honesty in fact in the conduct or transaction concerned." *In re Ellingsen MacLean Oil Company*, 834 F.2d at 605, quoting Uniform Commercial Code at Section 1-201(19).

There is no suggestion by the partnership that the March 1, 1990 financing order was the result of anything other than an arm's length transaction between the debtor and Fleet. The partnership's September 28, 1990 motion, insofar as it seeks relief under Rule 60(b)(4), suggests that the March 1, 1990 financing order is void to the extent it purports to affect the

debtor's leasehold estate derived under the April 11, 1974 Colonial lease as amended and as assigned to the debtor. In reality, it is this voidance theme which forms the entire basis of the partnership's motion. The arguments espoused by the partnership in the memorandums supporting its motion are identical to those asserted in its motion to vacate the September 15, 1989 order denying the partnership's motion to vacate the stay to permit it to re-enter and repossess the debtor's leasehold estate and authorizing [18] the debtor to assume the Colonial lease. This argument is rejected for the reasons previously stated in that portion of this memorandum dealing with the partnership's motion to vacate the September 15, 1989 order. Matters relating to obtaining credit under Section 364 are clearly core proceedings under 28 U.S.C. § 157(b)(2)(D). This Court had the jurisdiction to entertain the debtor's February 2, 1990 motion to incur secured debt under Section 364(c). It had jurisdiction to enter the March 1, 1990 financing order. The partnership's request for relief under Rule 60(b) seeking to set aside the March 1, 1990 financing order will be denied.

I will enter appropriate judgments on these motions, or appropriate orders. The orders will be entered separately. I will not enter consolidated orders. In the event these memorandums are transcribed, the court reporter will deliver the memorandums to me. I will supplement or amend my opinion, as I see fit. Upon filing of the signed memorandums, copies will, of course, be forwarded to counsel.

BY THE COURT:

/s/ RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

FILED: November 14, 1990, nunc pro tunc to October 31, 1990.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

MEMORANDUM OPINION
(Filed November 6, 1990)

This bankruptcy appeal is again before the Court, for consideration of The Cain Partnership's Fed. R. Civ. P. 60(b)(4) motion [doc. 36] to vacate the Orders entered previously by this Court affirming the decision of the United States Bankruptcy Court for the Eastern District of Tennessee from which this appeal was taken. This Court first ruled in this bankruptcy appeal in a Memorandum Opinion [doc. 19] and Order [doc. 20] filed on March 8, 1990. The Court affirmed the decision of the Bankruptcy Court denying The Cain Partnership's motion for relief from the automatic stay and granting the motion of the debtor, Pioneer Investment Services Company ("Pioneer") to assume the lease in controversy in this contested matter. This Court ruled that Tennessee law requires an affirmative act by a lessor to terminate a lease in the absence of a written forfeiture clause, and ruled that the

failure of The Cain Partnership to act affirmatively prepetition to terminate the debtor's lease precluded The Cain Partnership from treating this lease as terminated. This Court also ruled that Tennessee law does not permit unilateral termination of a lease for breach of a covenant in the absence of a termination or forfeiture clause. On the basis of this ruling, the Court held that neither any unlawful activity on the demised premises nor Pioneer's failure to pay real estate taxes promptly as required by the applicable lease agreement worked an automatic termination or forfeiture of Pioneer's lease.

In a Memorandum Opinion [doc. 29] and Order [doc. 30] filed on May 23, 1990, this Court denied The Cain Partnership's motion to amend this Court's earlier decision and/or petition for rehearing. The Court rejected The Cain Partnership's arguments that Tennessee statutes making unenforceable leases of real property for certain purposes, such as sales of obscene material, and providing for the abatement of nuisances terminated or forfeited Pioneer's lease *ipso jure*.

The Cain Partnership now argues that this Court's rulings in this bankruptcy appeal, and the decision of the Bankruptcy Court, should be vacated because neither court ever had subject-matter jurisdiction. The Cain Partnership's argument is that Pioneer's claim of a leasehold interest is a chose in action, that The Cain Partnership had and continues to have a "substantial meritorious" defense against this claim of a leasehold interest, and that Pioneer's claim of a leasehold interest was therefore not property of Pioneer's bankruptcy estate.

The grant of jurisdiction in 28 U.S.C. § 1334(b) is a grant of jurisdiction to United States district courts of all civil proceedings arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code. It is stated in § 1334(d), "The district court in which a case under [the Bankruptcy Code] is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate."

The provisions regarding the reference by the district courts

of bankruptcy cases and of "all proceedings arising under [the Bankruptcy Code] or arising in or related to a case under [the Bankruptcy Code]" to the bankruptcy courts are found in 28 U.S.C. § 157. "Core proceedings" in which bankruptcy courts may enter final, appealable orders and judgments, as opposed to proposed findings of fact and conclusions of law, include "motions to terminate, annul, or modify the automatic stay" and "orders approving the use or lease of property, including the use of cash collateral." 28 U.S.C. § 157(b)(2)(G) and (M). This case was initiated in part by The Cain Partnership's motion for relief from the 11 U.S.C. § 362 automatic stay, on the ground that it was entitled to recover possession of the deminsed premises for one or more prepetition breaches of Pioneer's lease obligations. As for the characterization of this case as a core proceeding to the extent that it involved the Bankruptcy Court's ruling on Pioneer's motion to assume the lease in controversy, § 365 of the Bankruptcy Code, 11 U.S.C. § 365, provides clearly for bankrupts' assumptions of unexpired leases, with bankruptcy court approval.

Section 541(a)(1) of the Bankruptcy Code, 11 U.S.C. § 541(a)(1), defines property of a bankruptcy estate as "all legal or equitable interests of the debtor in property as of the commencement of the case," with certain exceptions. One of these exceptions, in 11 U.S.C. § 541(b)(2), is for "any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case." The clear implication of this exception, read in the context of the broad, general definition of property of the estate, is that the interest of a debtor as a lessee under a lease of nonresidential real property which has not terminated at the expiration of its stated term is property of that debtor's bankruptcy estate. Therefore, in ruling that the lease in controversy in this case was not terminated or

forfeited prepetition, both the Bankruptcy Court below and this Court implicitly and necessarily ruled on the jurisdictional issue now raised by The Cain Partnership. Whether this lease had been terminated or forfeited prepetition was an issue of jurisdictional fact as well as an issue presented by the parties' opposing motions for relief from the automatic stay and for approval of the assumption of the unexpired lease.

The Cain Partnership's reliance upon *In re F & T Contractors, Inc.*, 718 F.2d 171 (6th Cir. 1983), requires a misreading of the Court of Appeals' opinion in that case which is so great that this Court must wonder whether the Rule 60(b)(4) motion under consideration is frivolous. First, *F & T Contractors* arose under the former Bankruptcy Act, not the Bankruptcy Code, and the jurisdictional issue in that case was presented under 11 U.S.C. § 11(a)(7), now superseded. Second, one ground of the decision in *F & T Contractors* that the bankruptcy court did not have jurisdiction of the debtor's counterclaim against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank was that claims against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank must be presented to the State court in which the receivership was initiated, and are specifically excluded from the scope of federal question subject-matter jurisdiction created in 12 U.S.C. § 1819 Fourth. This portion of the Court of Appeals' decision arguably renders its alternative decision concerning the bankruptcy court's jurisdiction of this counterclaim under the Bankruptcy Act *dictum*.

Third, the Court of Appeals' decision in *F & T Contractors* concerning the bankruptcy court's lack of bankruptcy jurisdiction of the debtor's counterclaim against the Federal Deposit Insurance Corporation in its capacity as the receiver of a failed State bank rests upon several distinctive facts. The claim of the debtor, a contractor, against the Federal Deposit Insuance Corporation was premised upon the allegedly wrongful concallation of several letters of credit by the receiver after the issuing bank was placed in receivership. However, the debtor was not the customer of the issuing bank

with respect to these letters of credit; the letters were issued at the request of an affiliate of the debtor, a developer. The receiver was alleged to have wrongfully withheld collateral which had been given to secure the obligations underlying the letters of credit, but this real property collateral was owned by another affiliate of the debtor. The debtor's only connection with the letters of credit was that it had cosigned mortgage notes made to the issuing bank in exchange for the issuance of the letters of credit. Therefore, the only property related to this case which was in the custody or possession of the debtor was its naked chose in action against the receiver; the debtor did not have custody or possession of either the cancelled letters of credit or the collateral given to the issuing bank, and was not entitled to custody or possession of either of these.

This is obviously a far cry from a commercial lease of premises which are in the custody and possession of the debtor at the time of the commencement of the debtor's case in bankruptcy. This Court finds that the Bankruptcy Court below had jurisdiction to hear and to decide the contested matter created by the parties' opposing motions for relief from the automatic stay and for approval of the assumption of an unexpired lease, and that this Court has jurisdiction under 28 U.S.C. § 158(a) to hear and to decide this bankruptcy appeal. The Court will accordingly deny The Cain Partnership's Rule 60(b)(4) motion.

ENTER:

/s/ Leon Jordan
United States District Judge

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-89-0827

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor-in-Possession.

THE CAIN PARTNERSHIP, LTD.,
Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, et al.,
Appellees.

ORDER
(Filed November 6, 1990)

For the reasons stated in the Memorandum Opinion filed simultaneously with this Order, the Court finds the Fed. R. Civ. P. 60(b)(4) motion [doc. 36] of The Cain Partnership, Ltd. to vacate this Court's Orders entered previously in this bankruptcy appeal not well taken, and it is DENIED.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX L

No. 90-5766

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK, FIRST NATIONAL BANK OF LOUISVILLE: FIRST TENNESSEE BANK,
Defendants-Appellees.

ORDER
(Filed December 12, 1990)

BEFORE: MARTIN and NELSON, Circuit Judges; and PECK, Senior Circuit Judge.

Plaintiff, Cain Partnership, Ltd., appeals the district court's judgment affirming the bankruptcy court's order denying a motion by the plaintiff for relief from the automatic stay imposed by 11 U.S.C. § 362 and granting a motion by the debtor-in-possession, Pioneer Investment Services Company, to assume an unexpired lease. Plaintiff now moves to hold the appeal in abeyance and to remand the case to the district court and the bankruptcy court for ruling on plaintiff's motions to vacate judgment. The defendants have responded.

The plaintiff's notice of appeal was filed on June 11, 1990. On October 5, 1990, the plaintiff filed a motion to vacate judgment under Rule 60(b), Fed.R.Civ.P. in the bankruptcy court. On October 9, 1990, the plaintiff filed a motion to

vacate judgment under Rule 60(b) in the district court. The parties now advise this court that the district court and the bankruptcy court have denied the motion to vacate.

It is therefore ORDERED that the plaintiff's motion to hold the appeal in abeyance and to remand this case is denied as moot.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK
Defendants-Appellees.

ORDER
(Filed January 16, 1991)

The court having determined that consolidation of the above causes for purposes of submission only is appropriate,

It is ORDERED that the causes be and they hereby are consolidated for the purpose stated above.

ENTERED PURSUANT TO RULE 8(b), RULES OF THE SIXTH CIRCUIT.

/s/ Leonard Green, Clerk

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY, a/k/a PREMIERE RESTAURANT INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER

(Filed January 23, 1991)

In light of the briefing schedule imposed upon the appellant by Bankruptcy Rule 8009, the Court will consider the appellant's motion to hold this bankruptcy appeal in abeyance [doc. 2] before the expiration of the period allowed by L.R. 10.1, E.D. Tenn. The Court finds this motion well taken, and it is **GRANTED.** Neither party will be required to file briefs in this case until the further order of this Court. The appellant is **ORDERED** to advise the Court as soon as possible of a decision by the Court of Appeals for the Sixth Circuit in a related case, No. 90-6578.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX O

[LETTERHEAD OF UNITED STATES COURT OF APPEALS SIXTH CIRCUIT]

August 21, 1991

Larry E. Parrish, Esq.
Parrish, Shaw & Brandon
6075 Poplar Avenue
Suite 400 The Crescent Center
Memphis, TN 38119

RE: 90-6578: 90-5766
Cain Partnership Ltd vs. Pioneer Investment
District Court No. 89-00827

Dear Mr. Parrish:

This letter is to advise that the panel assigned to this case has granted your motion to supplement the record has been granted.

Very truly yours,
Leonard Green, Clerk

/s/ YVONNE HENDERSON
Deputy Clerk

cc:
Thomas R. Stinnett Jr.
William R. O'Bryan Jr.
Craig J. Donaldson

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,
Defendants-Appellees.

APPELLANT'S SUGGESTION TO SUPPLEMENT RECORD ON APPEAL BY INCLUSION OF AN OMITTED PART OF THE RECORD BELOW
(Filed August 13, 1991)

COMES NOW The Cain Partnership, Ltd., appellant, pursuant to *Federal Rules of Appellate Procedure*, Rule 10(e), and suggests that this court direct that a supplement to the record on appeal be certified and transmitted by the clerk of the district court below to this court.

More particularly, appellant notes, in Appellant's Brief, page 5, that appellant filed, in the bankruptcy court below, a motion to vacate based on *Federal Rules of Civil Procedure*, Rule 60(b)(4). As a result of the aforesaid motion to vacate, the bankruptcy court conducted an open court hearing after

which a transcript thereof was prepared and filed as part of the record below.

In light of questions raised by the court at the oral argument before this court, on August 8, 1991, appellant suggests that the following portion of the aforesaid transcript be included in the record on appeal commencing at page 11, line 6 thereof through page 11, line 16; page 13, line 18 thereof through page 14, line 24; page 19, line 15 thereof through page 22 line 11 thereof as follows:

> MR. PARRISH: . . . [A]nd I would suggest that at any time — well, the appeal that's pending now from Your Honor's September 15 order has as its primary force and effect a determination as to whether this leasehold was or was not property. I understand Your Honor's read that.
>
> THE COURT: Is that not the thrust of both these motions?
>
> * * *
>
> MR. PARRISH: . . . [W]hat I'm really saying is that the issue as to whether or not it was property was not addressable by the Court and the Court addressed it, that is, I'm way back behind whether the Court was right or wrong. The Court could be 100 percent right about what it ruled in its September 15th order with respect to termination clauses and all those things and still be required, I respectfully say and according to my reading of the law, to dismiss the order, because it went beyond what it had the power to address. And so I'm not asking to re-address it or to look at it again and see what you ruled was right or wrong with respect to termination clauses and other things, because to me and my reading of the law at this time is that that is all totally immaterial whether you were right or whether you were wrong when you ruled on September 15.
>
> THE COURT: Inherent in my ruling is finding of jurisdiction, is it not?

MR. PARRISH: Well, inherent in your ruling. Obviously, if the Court had concluded or decided it didn't have jurisdiction, it wouldn't have gone past the first paragraph, and so it is inherent. . . .

THE COURT: Well, the thrust of your argument was that the lease was terminated, and I found it was not terminated, and you're not accepting that, so you're here again wanting to re-litigate that termination issue. I've litigated it. Is that not the basis of these motions?

* * *

THE COURT: Mr. Parrish, do you want to respond briefly?

MR. PARRISH: With respect to the contention that the statutes say what they say, Mr. Donaldson still refuses to address the point that while property — what property — how broad the definition of property is in 541 does not resolve whether a particular thing is or is not property, it must be resolved by state law.

THE COURT: I've resolved it. Did I not resolve it?

MR. PARRISH: Yes, but it's the partnership's position that the law does not allow this Court to refer to the state law. That must be done in some other forum, not this forum. It's not a matter of — yes, it is clear Your Honor did do that and did refer to state law and did, based on state law, make a determination that this was property, but all of that is what the partnership claims the Court could not do.

* * *

THE COURT: Have you addressed that before the Sixth Circuit?

MR. PARRISH: In the motion that we filed, yes, and the Sixth Circuit is now holding its case in abeyance awaiting the determination of the motion that has been filed before the Sixth Circuit on the issue of threshold jurisdiction of the Bankruptcy Court, and so that is pending. Yes, that has been addressed.

. . . [I] filed a motion on the 10th of October, if I'm not mistaken, asking the Sixth Circuit to provisionally remand the case because of the issue of jurisdiction . . . and received a letter back, . . ., which is dated October 11, I believe, maybe the 10th, saying that the case is held in abeyance pending the outcome of the motion filed by the partnership before the Sixth Circuit.

* * *

THE COURT: You have raised these same issues before the Sixth Circuit?

MR. PARRISH: I've raised these same issues before the District Court, before the Sixth Circuit, and before this Court in successive motions. . . .

THE COURT: Well, why is not the Sixth Circuit the appropriate authority to rule on all of this?

MR. PARRISH: The Sixth Circuit . . . is an appropriate authority, but it's not the exclusive appropriate authority and the issues are — that are raised on Pages 32 and 33 of the reply brief that I filed are very real issues . . . and the one who is the appellant has much greater burdens, . . . And if the partnership is right and there was no jurisdiction here, to force the partnership to bear those risks during the appellate process, I suggest, is just inconsistent with justice.

THE COURT: All right. I'm going to recess until ten o'clock. I'm going to resolve these matters.

Respectfully submitted,

LARRY E. PARRISH, P.C.
Attorneys for Appellant

By: /s/ LARRY E. PARRISH
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was served upon the opposing counsel by placing a true and exact copy of same in the United States mail, postage prepaid, this 13th day of August 1991, addressed to the following:

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/s/ LARRY E. PARRISH

APPENDIX Q

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5766

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees.

ORDER
(Filed February 1, 1991)

BEFORE: KEITH and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

The plaintiff appeals the district court judgment affirming the bankruptcy court order denying plaintiff's motion for relief from the automatic stay imposed by 11 U.S.C. § 362 and granting a motion by the debtor-in-possession, Pioneer Investment Services Company, to assume an unexpired lease in which the plaintiff claims an interest. The plaintiff now moves to strike and expunge the defendants' December 3, 1990, response to plaintiff's motion to hold its appeal in abeyance and to remand the case to the district court and

bankruptcy court for ruling on plaintiff's motions to vacate judgment. The plaintiff also moves for a stay pending appeal. The defendants have responded in opposition to the plaintiff's motion for a stay. The plaintiff has filed a reply.

By order entered on December 12, 1990, this Court denied plaintiff's motion to hold the appeal in abeyance and to remand the case on the grounds that plaintiff's motion was moot. For the reasons set forth in the December 12 Order, plaintiff's motion to strike and expunge the defendant's December 3 response is also moot.

The factors regulating whether a stay pending appeal should issue are: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. *Hilton* v. *Braunskill*, 481 U.S. 770, 776 (1987). Upon review and consideration of the documents before the Court, we conclude that the defendant has not satisfied the criteria for a stay pending appeal.

It is therefore ORDERED that the motion to strike and expunge defendant's December 3 response is denied as moot and the motion for a stay pending appeal is denied.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX R

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 90-5766

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession,

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees.

ORDER
(Filed April 1, 1991)

BEFORE: MILBURN and BOGGS, Circuit Judges; and GILMORE, District Judge.*

The plaintiff appeals a district court judgment affirming a bankruptcy court order denying plaintiff's motion for relief from the automatic stay imposed by 11 U.S.C. § 362 and permitting the debtor to assume an unexpired lease for use of real property. The plaintiff now moves to certify questions of state law to the Tennessee Supreme Court. Upon review and con-

* The Honorable Horace W. Gilmore, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

sideration, the court concludes that the plaintiff's motion presents issues more appropriately addressed by the panel assigned to determine this case upon the merits.

It is therefore ORDERED that the motion to certify questions of state law is referred to the hearing panel which will determine this case on the merits.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

APPENDIX S

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed April 9, 1991)

The second of these bankruptcy appeals, No. CIV 3-90-0857 has been held in abeyance on the appellant's motion pending a decision by the Court of Appeals for the Sixth Circuit in a related case, No. 90-6578. The Court has assumed that the other appeal by the same appellant, No. CIV 3-90-0852, should be held in abeyance for the same period of time, and subject to the same conditions. The appellant is ORDERED to advise the Court in writing by June 28, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX T

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed July 3, 1991)

The Court is advised that a case related to these two bankruptcy appeals which is pending presently before the Court of Appeals for the Sixth Circuit, number 90-6578, has been set for oral argument on August 8, 1991. Therefore, proceedings in these bankruptcy appeals will continue to be STAYED. The appellant is ORDERED to advise the Court in writing by August 28, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX U

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-90-0852

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

NO. CIV-3-90-0857

In re PIONEER INVESTMENT SERVICES COMPANY,
a/k/a PREMIERE RESTAURANT
INVESTMENT COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed August 29, 1991)

The Court being advised that a case related to these two bankruptcy appeals which is pending presently before the Court of Appeals for the Sixth Circuit, No. 90-6578, remains pending, proceedings in these bankruptcy appeals will continue to be **STAYED.** The appellant is **ORDERED** to advise the Court in writing by Monday, December 30, 1991 of the status of the case pending before the Court of Appeals, and to advise whether proceedings in either or both of these bankruptcy appeals should continue to be stayed.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX V

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5766/6578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, FLEET NATIONAL BANK, FIRST NATIONAL BANK OF LOUISVILLE and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Eastern District of Tennessee
(Decided and Filed September 18, 1991)

Before: KENNEDY and MILBURN, Circuit Judges;
ZATKOFF, District Judge.*

KENNEDY, Circuit Judge. Appellant appeals from the District Court's affirmance of the Bankruptcy Court's order denying appellant's motion for relief from an automatic stay

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

and debtor's motion for approval of assumption of an unexpired lease. Two issues are presented to this Court: 1) whether the Bankruptcy Court and District Court had subject matter jurisdiction to adjudicate these motions; and 2) whether the Bankruptcy Court and District Court properly applied Tennessee law to the leasehold issues raised by appellant. For the following reasons, we **AFFIRM.**

I.

A.

On April 12, 1989, Pioneer Investment Services Company ("debtor" or "Pioneer") filed a voluntary petition in bankruptcy and became a debtor-in-possession. Included in its amended schedule of assets filed with the Bankruptcy Court was an unexpired lease of approximately 95.5 acres of nonresidential real property ("Colonial Lease") to which Cain Partnership, Ltd. ("Partnership" or "appellant") was a party. On May 18, 1989, Pioneer filed a motion in bankruptcy court to assume the Colonial Lease.

On May 25, 1989, the Partnership filed a motion to lift the automatic stay imposed pursuant to 11 U.S.C. § 362 so that the Partnership could repossess the real property subject to the Colonial Lease. The Partnership claimed that Pioneer had breached the lease prior to filing for bankruptcy resulting in the automatic termination of the lease and forfeiture of any right to use or any interest in the property. Fleet National Bank and First National Bank intervened in this proceeding.

On June 15, 1989, the Bankruptcy Court held proceedings on these motions. The Bankruptcy Court initially notified all parties that these were core proceedings. Each party claimed that they had a right to use the property subject to the Colonial Lease, and that such right was superior to the other party's right. The Bankruptcy Court issued an order on September 15, 1989, denying the Partnership's motion to lift the stay and granting debtor's motion to assume the Colonial Lease.

The Partnership appealed from this order to the District Court. On March 8, 1990, the District Court affirmed the

Bankruptcy Court's decision. The District Court subsequently denied the Partnership's motion for a rehearing.

On June 1, 1990, the Partnership appealed to this Court. During the pendency of this appeal, the Parnership represented to the Court in writing that "to Appellants' knowledge there are no issues with respect to jurisdiction." Attachment C to the Civil Appeal Pre-Argument Statement in Case No. 90-5766. Notwithstanding this assertion, the Partnership filed a motion entitled "Appellant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties.[1] This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

The Partnership filed a motion in the District Court requesting that it vacate its order because it lacked subject matter jurisdiction to adjudicate the issues previously decided. The District Court denied this Motion. This Court then docketed the Partnership's appeal.

B.

The facts relevant to this appeal are not in dispute. The debtor became obligated under the Colonial Lease as a result of a series of assignments. The Colonial Lease, as executed between the original parties, provides: "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee. However, the Lessee shall remain liable to the Lessor for lease payment and payment of taxes." The lease agreement does

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[1] Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

not address default, forfeiture or remedies for breach, except for provision of attorney's fees if the Partnership were required to resort to legal action to enforce its rights under the lease agreement.

Rent and property taxes owed by Pioneer were paid from an escrow account pursuant to an agreement collateral to the lease. The agreement, executed by several parties including Valley Fidelity Bank and Trust Company ("Valley), obligated Valley to pay from the escrow account monthly installments of rent and all real property taxes for the property subject to the Colonial Lease. At all times relevant to this action, Pioneer maintained sufficient funds in the escrow account to satisfy these obligations. Valley, however, failed to pay real property tax obligations which arose prior to debtor's bankruptcy filing. On May 2, 1989, almost one month after debtor filed its bankruptcy petition, The Partnership paid the overdue tax obligations. Prior to these payments, the Partnership never gave notice to Pioneer that Valley had not paid the real estate taxes; nor did the Partnership ever request that Pioneer make these payments. At no time did the Partnership notify Pioneer or take any actions to indicate that the Colonial Lease was terminated.

II.

The Partnership first contends that the Bankruptcy Court lacked subject mater jurisdiction to hear and determine the issue raised in the parties' motions — whether debtor's prepetition breach automatically terminated the Colonial Lease — because it was a matter to be resolved solely by the application of state law. Appellant argues that the statutory grant of jurisdiction to bankruptcy courts over core proceedings is unconstitutional. Resolution of this issue requires a brief overview of the statutory development of the bankruptcy court's jurisdiction.

Under the Bankruptcy Act of 1898, proceedings in bankruptcy were summary, as opposed to plenary, in nature. *Cline* v. *Kaplan*, 323 U.S. 97 (1944). Bankruptcy courts "ha[d] the power to adjudicate summarily rights and claims

to property which [was] in the actual or constructive possession of the court." *Cline*, 323 U.S. at 98. Without such possession, and lacking consent of the adverse party to the jurisdiction of the bankruptcy court, the court did not have jurisdiction over a claim.

The enactment of the Bankruptcy Reform Act of 1978 (the "Code") eliminated the concept of actual or constructive possession of property as the primary basis for bankruptcy court jurisdiction. The Code granted the bankruptcy court all of the district court's bankruptcy jurisdiction. Thus, the bankruptcy court could hear and determine any issue arising in a bankruptcy case. This broad jurisdictional grant was subsequently declared unconstitutional by the Supreme Court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Congress sought to remedy this constitutional defect by passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). The instant case is governed by the jurisdictional provisions of BAFJA.

Under the Code as amended by BAFJA, the district courts have original and exclusive jurisdiction over all title II cases. 28 U.S.C.A. § 1334(a) (West Supp. 1991). The district courts also have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b). A district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Thus, the Code grants broad jurisdictional powers to Article III district courts, and these courts have discretion to exercise this jurisdiction or refer the case or proceeding to the bankruptcy courts. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L.Rev. 675, 678 (1985).

Section 157 establishes the jurisdictional limits of the bankruptcy court. Section 157(a) authorizes the district court to refer to the bankruptcy court "any or all cases under title 11 and any or all proceedings arising under title 11 or arising

in or related to a case under title 11 . . . ."[2] Section 157 distinguishes between "core" and "noncore" proceedings. *Compare* 28 U.S.C. § 157(b)(2) (enumerating a nonexhaustive list of core proceedings) *with id.* § 157(c)(1). Significant jurisdictional consequences flow from this distinction.

A bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* § 157(b)(1). This section gives bankruptcy judges authority to enter final orders in core proceedings. Included in section 157(b)(2)'s nonexhaustive list of proceedings which are considered core proceedings are "matters concerning the administration of the estate," *id.* § 157(B)(2)(A), "orders to turn over property of the estate," *id.* § 157(b)(2)(E), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," *id.* § 157(b)(2)(O) — provisions relied upon by the Bankruptcy Court in the instant case to assert jurisdiction.

On the other hand, a bankruptcy court's jurisdiction and authority are more circumscribed in the context of noncore proceedings. Section 157(c)(1) does not permit a bankruptcy court to enter a final order as to a noncore proceeding, but states that the bankruptcy court is to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions." Notwithstanding this limitation, section 157(c)(2) permits a bankruptcy court to hear and determine a noncore proceeding if the parties consent.

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[2] The term "case" as used in the Code is a term of art and "comprises the Chapter 7, 9, 11 or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a 'petition,' another word of art." King, 38 Vand. L.Rev. at 676-77 (footnote omitted). Disputes that arise during the pendency of a case are referred to as "proceedings." Numerous proceedings may occur within a case.

"Under BAFJA, then, all bankruptcy jurisdiction is given in the first instance to the district court. Of the three types of proceedings, bankruptcy cases (cases seeking relief under title 11), core proceedings (proceedings within bankruptcy cases which seek the creation, recognition, determination, or adjudication of rights which do not exist independent of title 11 or the bankruptcy case) and related proceedings (proceedings which could have been brought in state court had there been no title 11 bankruptcy case filed) . . . , the bankruptcy court may hear and determine the first two in all instances; it may hear and report in the latter, although consent of the parties will permit it to hear and determine." *Acolyte Elec. Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986).

The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved,[3] we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties.

This Court recently decided a case similar to the instant case. *In re Southern Indus. Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). In *Southern Industrial*, the bankruptcy court asserted jurisdiction over a proceeding based on its status as a core proceeding. None of the parties contested this basis of jurisdiction. The bankruptcy court heard and determined the merits of the proceeding, and the losing party appealed to the district court arguing, *inter alia*, that the bankruptcy court acted outside its jurisdiction. The district court held that the dispute was a core proceeding and thus jurisdiction was proper. On appeal to this Court we concluded that the pro-

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[3] Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

ceeding was more properly characterized as a noncore proceeding, but jurisdiction was proper based on the parties' consent. We reasoned:

> Even if express consent has not been proven, we agree with recent cases in bankruptcy courts that have supported the notion that the absence of a timely objection to the bankruptcy court's jurisdiction constitutes an implied consent to the resolution of the controversy.

Id. at 331.

Similarly, in *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987), the Second Circuit concluded that the parties impliedly consented to the bankruptcy's jurisdiction over the proceeding when jurisdiction was not contested until after the decision of the bankruptcy court and after the appeal to the district court. The *Sportswear* court stated:

> We are cognizant that a court should not lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge. Indeed, to do so would violate the spirit of *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) . . . . However . . . , Sasson's silence on the jurisdictional issue before both [the bankruptcy court] and the [district court] can only be construed as implied consent. . . . Sasson's protest at this stage in the litigation more closely resembles an afterthought than a bona fide objection.

Id. at 1138.

The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the instant noncore proceeding. In its written motion to lift the automatic stay, the Partnership denominated three issues for resolution, none of which questioned the jurisdiction of the Bankruptcy Court. Appellant did not protest jurisdiction at

any point in the proceeding before the Bankruptcy Court. Similarly, appellant failed to raise any objection to the jurisdiction of the Bankruptcy Court on appeal to the District Court.

In its notice of appeal to this Court, appellant represented that there were no issues with respect to jurisdiction. Notwithstanding this assertion, appellant subsequently raised the issue of jurisdiction. Thus, it was not until after an appeal had been filed with this Court, seventeen months after the initial motions were filed in Bankruptcy Court and after adjudication both by the Bankruptcy Court and by the District Court, that appellant first raised the issue of jurisdiction. Under these circumstances, we conclude that the Partnership impliedly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine this noncore but related proceeding.

The Partnership next contends that the Bankruptcy Court and District Court misapplied Tennessee law. The Partnership alleges four errors: 1) the District Court erred in affirming the Bankruptcy Court's decision that absent a specific provision to the contrary, breach of a commercial lease does not result in automatic termination under Tennessee law; 2) the District Court erred in affirming the Bankruptcy Court's decision that an unlawful use of a portion of a leased premises does not allow the lessor to terminate the lease; 3) the District Court erred in affirming the Bankruptcy Court's decision that the lease does not prohibit assignment; and 4) the District Court erred in affirming the Bankruptcy Court's decision that the transfer by Colonial to Orange Tee, a third party, of a portion of the leased property was an assignment.

Central to most of these allegations is the effect of breach upon a lease agreement that does not contain a termination or forfeiture clause. Relying primarily upon *Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281 (Tenn. Ct. App. 1981), *Green* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, 11 Tenn. App. 366 (Tenn. 1930), and *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876), the bankruptcy court and the district court determined

that Tennessee law requires affirmative conduct by a lessor in order to terminate a nonresidential lease which lacks a termination or forfeiture clause on the ground of breach. Accordingly, the courts below concluded that the Colonial Lease, which lacks a termination or forfeiture clause, was not terminated prior to the filing of Pioneer's bankruptcy petition because the Partnership took no action to terminate the lease. We think that the District Court properly interpreted and applied Tennessee law in reaching this conclusion.

The other issues raised by the Partnership are without merit.

III.

For the foregoing reasons, the decision of the District Court is **AFFIRMED.** In light of our disposition of this case, there is no need to certify the second issue raised by the Partnership to the Supreme Court of Tennessee. The motion to certify is denied.

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 90-5766: 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

Before: Kennedy and Milburn, Circuit Judges; Zatkoff, District Judge

JUDGMENT
(Filed September 18, 1991)

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schaver, Deputy Clerk

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 90-5766/6578

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK,

Defendants-Appellees

ORDER
(Filed October 21, 1991)

BEFORE: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

Upon sua sponte consideration, it is ORDERED that the mandate in the above cause be and it hereby is RECALLED at the direction of the panel.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Clerk

* The Honorable Lawrence Zatkoff, District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX Y

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 90-5766/6578

In re: PIONEER INVESTMENT SERVICES COMPANY,

Debtor.

THE CAIN PARTNERSHIP, LTD.,

Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Defendants-Appellees.

ORDER
(Filed October 28, 1991)

Before: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

It appearing to the Court that reliance on the pre-argument statement may conflict with advice given by the Court's pre-argument attorneys,

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

IT IS HEREBY ORDERED that the following paragraph appearing in the slip opinion filed in this case on page 3 beginning "On June 1, 1990," be amended to read:

> On June 1, 1990, the Partnership appealed to this Court (90-5766). Its brief on that appeal raised no jurisdictional issue. The issue was first raised when the Partnership filed a motion entitled "Appellant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties. This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

IT IS FURTHER ORDERED that the following language at the end of footnote 1 should be added: "The Rule 60(b) motion was filed in the District Court October 9, 1990."

IT IS FURTHER ORDERED that on page 9 of the slip opinion at the beginning of the last paragraph the first sentence should read:

> In its initial appeal to this Court, appellant raised no issues with respect to jurisdiction.

An amended opinion is attached.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX Z

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-5766/6578

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In Re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor,

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; and FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

ON APPEAL from the United States District Court
for the Eastern District of Tennessee
(Decided and Filed October 28, 1991)

AMENDED OPINION

Before: KENNEDY and MILBURN, Circuit Judges; ZATKOFF, District Judge.*

KENNEDY, Circuit Judge. Appellant appeals from the District Court's affirmance of the Bankruptcy Court's order

* The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

denying appellant's motion for relief from an automatic stay and granting debtor's motion for approval of assumption of an unexpired lease. Two issues are presented to this Court: 1) whether the Bankruptcy Court and District Court had subject matter jurisdiction to adjudicate these motions; and 2) whether the Bankruptcy Court and District Court properly applied Tennessee law to the leasehold issues raised by appellant. For the Following reasons, we **AFFIRM.**

I.

A.

On April 12, 1989, Pioneer Investment Services Company ("debtor" or "Pioneer") filed a voluntary petition in bankruptcy and became a debtor-in-possession. Included in its amended schedule of assets filed with the Bankruptcy Court was an unexpired lease of approximately 95.5 acres of nonresidential real property ("Colonial Lease") to which Cain Partnership, Ltd. ("Partnership" or "appellant") was a party. On May 18, 1989, Pioneer filed a motion in bankruptcy court to assume the Colonial Lease.

On May 25, 1989, the Partnership filed a motion to lift the automatic stay imposed pursuant to 11 U.S.C. § 362 so that the Partnership could repossess the real property subject to the Colonial Lease. The Partnership claimed that Pioneer had breached the lease prior to filing for bankruptcy resulting in the automatic termination of the lease and forfeiture of any right to use or any interest in the property. Fleet National Bank and First National Bank intervened in this proceeding.

On June 15, 1989, the Bankruptcy Court held proceedings on these motions. The Bankruptcy Court initially notified all parties that these were core proceedings. Each party claimed that they had a right to use the property subject to the Colonial Lease, and that such right was superior to the other party's right. The Bankruptcy Court issued an order on September 15, 1989, denying the Partnership's motion to lift the stay and granting debtor's motion to assume the Colonial Lease.

The Partnership appealed from this order to the District Court. On March 8, 1990, the District Court affirmed the Bankruptcy Court's decision. The District Court subsequently denied the Partnership's motion for a rehearing.

On June 1, 1990, the Partnership appealed to this Court (90-5766). Its brief on that appeal raised no jurisdictional issue. The issue was first raised when the Partnership filed a motion entitled "Appeallant's Motion To Hold Appeal In Abeyance And Remand For Disposition Of Motion To Vacate As Void The Order Appealed." This motion was filed pursuant to Federal Rules of Civil Procedure 60(b)(4) and raised for the first time the issue of whether the Bankruptcy Court and District Court had jurisdiction to adjudicate the issues raised by the parties.[1] This Court ordered the appeal held in abeyance awaiting disposition of the motion filed by the Partnership in the District Court.

The Partnership filed a motion in the District Court requesting that it vacate its order because it lacked subject matter jurisdiction to adjudicate the issues previously decided. The District Court denied this Motion. This Court then docketed the Partnership's appeal.

B.

The facts relevant to this appeal are not in dispute. The debtor became obligated under the Colonial Lease as a result of a series of assignments. The Colonial Lease, as executed between the original parties, provides: "This lease may be assigned or the leased premises may be sublet in whole or in part for any lawful purpose at the will of the Lessee.

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[1] Rule 60(b) states in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . .

The Rule 60(b) motion was filed in the District Court October 9, 1990.

However, the Lessee shall remain liable to the Lessor for lease payment and payment of taxes." The lease agreement does not address default, forfeiture or remedies for breach, except for provision of attorney's fees if the Partnership were required to resort to legal action to enforce its rights under the lease agreement.

Rent and property taxes owed by Pioneer were paid from an escrow account pursuant to an agreement collateral to the lease. The agreement, executed by several parties including Valley Fidelity Bank and Trust Company ("Valley), obligated Valley to pay from the escrow account monthly installments of rent and all real property taxes for the property subject to the Colonial Lease. At all times relevant to this action, Pioneer maintained sufficient funds in the escrow account to satisfy these obligations. Valley, however, failed to pay real property tax obligations which arose prior to debtor's bankruptcy filing. On May 2, 1989, almost one month after debtor filed its bankruptcy petition, the Partnership paid the overdue tax obligations. Prior to these payments, the Partnership never gave notice to Pioneer that Valley had not paid the real estate taxes; nor did the Partnership ever request that Pioneer make these payments. At no time did the Partnership notify Pioneer or take any actions to indicate that the Colonial Lease was terminated.

II.

The Partnership first contends that the Bankruptcy Court lacked subject mater jurisdiction to hear and determine the issue raised in the parties' motions — whether debtor's prepetition breach automatically terminated the Colonial Lease — because it was a matter to be resolved solely by the application of state law. Appellant argues that the statutory grant of jurisdiction to bankruptcy courts over core proceedings is unconstitutional. Resolution of this issue requires a brief overview of the stautotry development of the bankruptcy court's jurisdiction.

Under the Bankruptcy Act of 1898, proceedings in bankruptcy were summary, as opposed to plenary, in nature. *Cline*

v. *Kaplan*, 323 U.S. of 97 (1944). Bankruptcy courts "ha[d] the power to adjudicate summarily rights and claims to property which [was] in the actual or constructive possession of the court." *Cline*, 323 U.S. at 98. Without such possession, and lacking consent of the adverse party to the jurisdiction of the bankruptcy court, the court did not have jurisdiction over a claim.

The enactment of the Bankruptcy Reform Act of 1978 (the "Code") eliminated the concept of actual or constructive possession of property as the primary basis for bankruptcy court jurisdiction. The Code granted the bankruptcy court all of the district court's bankruptcy jurisdiction. Thus, the bankruptcy court could hear and determine any issue arising in a bankruptcy case. This broad jurisdictional grant was subsequently declared unconstitutional by the Supreme Court. *See Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Congress sought to remedy this constitutional defect by passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). The instant case is governed by the jurisdictional provisions of BAFJA.

Under the Code as amended by BAFJA, the district courts have original and exclusive jurisdiction over all title II cases. 28 U.S.C.A. § 1334(a) (West Supp. 1991). The district courts also have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." *Id.* § 1334(b). A district court "may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." *Id.* § 157(a). Thus, the Code grants broad jurisdictional powers to Article III district courts, and these courts have discretion to exercise this jurisdiction or refer the case or proceeding to the bankruptcy courts. King, *Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 Vand. L.R. 675, 678 (1985).

Section 157 establishes the jurisdictional limits of the bankruptcy court. Section 157(a) authorizes the district court to refer to the bankruptcy court "any or all cases under title 11

and any or all proceedings arising under title 11 or arising in or related to a case under title 11 . . . ."[2] Section 157 distinguishes between 'core" and "noncore" proceedings. *Compare* 28 U.S.C. § 157(b)(2) (enumerating a nonexhaustive list of core proceedings) *with id.* § 157(c)(1). Significant jurisdictional consequences flow from this distinction.

A bankruptcy court has jurisdiction to "hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 . . . ." *Id.* § 157(b)(1). This section gives bankruptcy judges authority to enter final orders in core proceedings. Included in section 157(b)(2)'s nonexhaustive list of proceedings which are considered core proceedings are "matters concerning the administration of the estate," *id.* § 157(B)(2)(A), "orders to turn over property of the estate," *id.* § 157(b)(2)(E), and "other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship," *id.* § 157(b)(2)(O) — provisions relied upon by the Bankruptcy Court in the instant case to assert jurisdiction.

On the other hand, a bankruptcy court's jurisdiction and authority are more circumscribed in the context of noncore proceedings. Section 157(c)(1) does not permit a bankruptcy court to enter a final order as to a noncore proceeding, but states that the bankruptcy court is to "submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions." Notwithstanding this limitation, sec-

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[2] The term "case" as used in the Code is a term of art and "comprises the Chapter 7, 9, 11 or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a 'petition,' another word of art." King, 38 Vand. L.R. at 676-77 (footnote omitted). Disputes that arise during the pendency of a case are referred to as "proceedings." Numerous proceedings may occur within a case.

tion 157(c)(2) permits a bankruptcy court to hear and determine a noncore proceeding if the parties consent.

"Under BAFJA, then, all bankruptcy jurisdiction is given in the first instance to the district court. Of the three types of proceedings, bankruptcy cases (cases seeking relief under title 11), core proceedings (proceedings within bankruptcy cases which seek the creation, recognition, determination, or adjudication of rights which do not exist independent of title 11 or the bankruptcy case) and related proceedings (proceedings which could have been brought in state court had there been no title 11 bankruptcy case filed) . . . , the bankruptcy court may hear and determine the first two in all instances; it may hear and report in the latter, although consent of the parties will permit it to hear and determine." *Acolyte Elec. Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986).

The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved,[3] we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties.

This Court recently decided a case similar to the instant case. *In re Southern Indus. Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). In *Southern Industrial*, the bankruptcy court asserted jurisdiction over a proceeding based on its status as a core proceeding. None of the parties contested this basis of jurisdiction. The bankruptcy court heard and determined the merits of the proceeding, and the losing party appealed to the district court arguing, *inter alia*, that the bankruptcy court acted outside its jurisdiction. The district court held that the

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[3] Appellant's motion is based on rights which could have been brought in state court had there been no title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights of either party granted by virtue of the filing of a title 11 bankruptcy case. Such a strict reading of "core" is necessitated by the Supreme Court's holding in *Marathon*.

dispute was a core proceeding and thus jurisdiction was proper. On appeal to this Court we concluded that the proceeding was more properly characterized as a noncore proceeding, but jurisdiction was proper based on the parties' consent. We reasoned:

> Even if express consent has not been proven, we agree with recent cases in bankruptcy courts that have supported the notion that the absence of a timely objection to the bankruptcy court's jurisdiction constitutes an implied consent to the resolution of the controversy.

Id. at 331.

Similarly, in *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987), the Second Circuit concluded that the parties impliedly consented to the bankruptcy's jurisdiction over the proceeding when jurisdiction was not contested until after the decision of the bankruptcy court and after the appeal to the district court. The *Sportswear* court stated:

> We are cognizant that a court should not lightly infer from a litigant's conduct consent to have private state-created rights adjudicated by a non-Article III bankruptcy judge. Indeed, to do so would violate the spirit of *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) . . . . However . . . , Sasson's silence on the jurisdictional issue before both [the bankruptcy court] and the [district court] can only be construed as implied consent. . . . Sasson's protest at this stage in the litigation more closely resembles an afterthought than a bona fide objection.

Id. at 1138.

The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the instant noncore proceeding. In its written motion to lift the automatic stay, the Partnership denominated three issues for resolution, none of which questioned the jurisdiction of the Bankruptcy

Court. Appellant did not protest jurisdiction at any point in the proceeding before the Bankruptcy Court. Similarly, appellant failed to raise any objection to the jurisdiction of the Bankruptcy Court on appeal to the District Court.

In its initial appeal to this Court, appellant raised no issues with respect to jurisdiction. Notwithstanding this assertion, appellant subsequently raised the issue of jurisdiction. Thus, it was not until after an appeal had been filed with this Court, seventeen months after the initial motions were filed in Bankruptcy Court and after adjudication both by the Bankruptcy Court and by the District Court, that appellant first raised the issue of jurisdiction. Under these circumstances, we conclude that the Partnership impliedly, if not expressly, consented to the jurisdiction of the Bankruptcy Court to hear and determine this noncore but related proceeding.

The Partnership next contends that the Bankruptcy Court and District Court misapplied Tennessee law. The Partnership alleges four errors: 1) the District Court erred in affirming the Bankruptcy Court's decision that absent a specific provision to the contrary, breach of a commercial lease does not result in automatic termination under Tennessee law; 2) the District Court erred in affirming the Bankruptcy Court's decision that an unlawful use of a portion of a leased premises does not allow the lessor to terminate the lease; 3) the District Court erred in affirming the Bankruptcy Court's decision that the lease does not prohibit assignment; and 4) the District Court erred in affirming the Bankruptcy Court's decision that the transfer by Colonial to Orange Tee, a third party, of a portion of the leased property was an assignment.

Central to most of these allegations is the effect of breach upon a lease agreement that does not contain a termination or forfeiture clause. Relying primarily upon *Nashville Record Productions, Inc.* v. *Mr. Transmission, Inc.*, 623 S.W.2d 281 (Tenn. Ct. App. 1981), *Green* v. *Donnell*, 11 Tenn. App. 366, 371, *cert. denied*, 11 Tenn. App. 366 (Tenn. 1930), and *Planters Ins. Co.* v. *Diggs*, 67 Tenn. (8 Baxter) 563 (Tenn. 1876), the bankruptcy court and the district court determined that Tennessee law requires affirmative conduct by a lessor in

order to terminate a nonresidential lease which lacks a termination or forfeiture clause on the ground of breach. Accordingly, the courts below concluded that the Colonial Lease, which lacks a termination or forfeiture clause, was not terminated prior to the filing of Pioneer's bankruptcy petition because the Partnership took no action to terminate the lease. We think that the District Court properly interpreted and applied Tennessee law in reaching this conclusion.

The other issues raised by the Partnership are without merit.

III.

For the foregoing reasons, the decision of the District Court is **AFFIRMED.** In light of the our disposition of this case, there is no need to certify the second issue raised by the Partnership to the Supreme Court of Tennessee. The motion to certify is denied.

APPENDIX AA

No: 90-5766: 90-6578

In re: PIONEER INVESTMENT SERVICES COMPANY,
Debtor in Possession.

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK: FIRST NATIONAL BANK OF LOUISVILLE: FIRST TENNESSEE BANK NATIONAL ASSOCIATION,
Defendants-Appellees.

Before: Kennedy and Milburn, Circuit Judges;
Zatkoff, District Judge

AMENDED JUDGMENT

(Filed October 28, 1991)

ON APPEAL from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered that the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

A True Copy.

Attest:

/s/ Diane Schnur
Deputy Clerk

APPENDIX BB

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: PIONEER INVESTMENT SERVICES COMPANY,
Debtor in Possession.

THE CAIN PARTNERSHIP, LTD.,
Plaintiff-Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY, ET AL.,
Defendants-Appellees.

ORDER
(Filed December 19, 1991)

BEFORE: KENNEDY and MILBURN, Circuit Judges; and ZATKOFF,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

* Hon. Lawrence P. Zatkoff sitting by designation for the Eastern District of Michigan.

APPENDIX CC

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

NO. CIV-3-90-0857

In re: PIONEER INVESTMENT SERVICES,
a/k/a Premiere Restaurant Investment Company,

Debtor;

THE CAIN PARTNERSHIP, LTD.,

Appellant,

v.

PIONEER INVESTMENT SERVICES COMPANY,

Appellee.

ORDER
(Filed January 29, 1992)

All issues in this bankruptcy appeal (*see* the appellant's Bankruptcy Rule 8006 statement of the issues to be presented, item no. 16 in the record on appeal [doc. 1]), are governed by the decision of the Court of Appeals for the Sixth Circuit in *In re Pioneer Investment Services Company*, Nos. 90-5766/6578, amended slip opinion filed October 28, 1991. The Court finds that there is no just cause to continue to stay proceedings in this appeal, and finds also that briefing and argument on the issues presented would be redundant. The Court finds the appellant has not shown good cause [*see* docs. 7 and 8] why this appeal should not be dismissed.

It is therefore **ORDERED** that the order of the United

States Bankruptcy Court for the Eastern District of Tennessee filed October 31, 1990, denying the appellant's Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(b)(4) motion to vacate the Bankruptcy Court's September 15, 1989 orders denying the appellant's motion to lift the automatic stay and granting the appellee's motion to assume a lease, *see* item no. 12 in the record on appeal, is **AFFIRMED** in all respects under Bankruptcy Rule 8013.

ENTER:

/s/ LEON JORDAN
United States District Judge

APPENDIX DD

SUPREME COURT OF THE UNITED STATES

No. A-638

The Cain Partnership, Ltd.,

Petitioner,

v.

Pioneer Investment Services Company, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including April 7, 1992.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 2nd
day of March, 1992.

APPENDIX EE

UNITED STATES CONSTITUTION

Article III, Section 1. Supreme Court and inferior courts — Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V. Criminal actions — Provisions concerning — Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

§ 1334. Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civill proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceedings arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate.

§ 157. Procedures.

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under tilte 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to —

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the

district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(2)

No. 91-1625

Supreme Court, U.S.
FILED
MAY 7 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

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(Continued)

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QUESTION PRESENTED FOR REVIEW

Should this Court grant a writ of certiorari to decide whether 28 U.S.C. § 157, which provides that a bankruptcy court may enter a final order in a core proceeding, violates Article III of the Constitution?

LIST OF PARTIES

The parent corporation of Fleet National Bank is Fleet Financial Group, Inc. All of the subsidiaries of Fleet National Bank are wholly-owned.

The parent corporation of First National Bank of Louisville is First Kentucky National Corporation. All of the subsidiaries of First National Bank of Louisville are wholly-owned.

The parent corporation of First Tennessee Bank National Association is First Tennessee National Corporation. All of the subsidiaries of First Tennessee Bank National Association are wholly-owned.

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No. 91-1625

In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

STATEMENT OF THE CASE

A. Introduction.

Petitioner argues that it constitutes a violation of Article III of the Constitution for a bankruptcy court to issue a final order in a core proceeding under the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"). In this case, the bankruptcy court made a final determination that the lease between the Cain Partnership, Ltd. ("Cain Partnership") and Pioneer Investment Services Company ("Pioneer") did not terminate automatically prior to Pioneer's bankruptcy petition and thus, could be assumed under 11 U.S.C. § 365. The district court affirmed that decision on appeal. Contrary to the petitioner's assertions, the Sixth Circuit Court of Appeals did not specifically hold that the proceeding concerning Pioneer's motion to assume the lease and Cain Partnership's motion to terminate the automatic stay was a noncore proceeding.[1] The Sixth Circuit did not disturb the lower courts' determinations that the proceeding was core. The Sixth Circuit held that even if the proceeding were noncore, the bankruptcy court could permissibly enter a final order under 28 U.S.C. § 157 because the parties had consented to the jurisdiction of the bankruptcy court.

B. Facts.

On April 12, 1989 Pioneer filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. Pioneer's main assets

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1. The Sixth Circuit held: "The Bankruptcy Court and District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a noncore but related proceeding because of the underlying issue involved, we nevertheless conclude that the Bankruptcy Court had jurisdiction to hear and determine this proceeding even if it is noncore based on the consent of the parties." (App. Z, Petition for Writ of Certiorari).

included the Towne and Country Shopping Center and The Commons located in part on the property covered by the lease that is the subject of this lawsuit. Pioneer listed an unexpired lease of nonresidential real property with Cain Partnership as an asset in its schedules of assets. Pioneer subsequently filed a motion to assume the lease, as permitted by 11 U.S.C. § 365. This was a core proceeding. 28 U.S.C. § 157(b)(2)(G).

Cain Partnership filed a motion for relief from the automatic stay so that it could terminate the lease. This was a core proceeding. 28 U.S.C. § 157(b)(2)(M). Cain Partnership claimed that the lease had automatically terminated prior to the bankruptcy petition when Pioneer failed to pay its property taxes, a default under the lease. Cain Partnership asked the bankruptcy court to order Pioneer to turn over the leased premises to the partnership (App. A). In its brief in support of its motion for relief from the stay, filed on May 24, 1989, Cain Partnership stated: "It is the contention of the Partnership that the [bankruptcy] court has sufficient jurisdiction over Debtor to require the turnover [of the leased premises] and that exercise of that jurisdiction is appropriate under the circumstances." (App. B).

Cain Partnership also stated to the bankruptcy court:

> Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue

> of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might be more simply accomplished by this court.

(App. B).

The Bankruptcy Code provides that thirty (30) days after a motion for relief from the stay, the stay is terminated with respect to the movant unless the court, after notice and a hearing, orders the stay to remain in effect pending the result of a final hearing and determination. 11 U.S.C. § 362(c). Cain Partnership entered an agreed pretrial order prior to the thirty (30) day deadline which provided:

> The Cain Partnership, Ltd. and all other parties agree that the automatic stay of 11 U.S.C. § 362 shall remain in effect until further orders of this Court pending a final decision of the Court on the motion of The Cain Partnership, Ltd, to lift the stay.

(App. A, Petition for Writ of Certiorari). At no time prior to its Rule 60 motion, filed three (3) months after its stay relief motion, did Cain Partnership assert that the bankruptcy court could not enter a final order.

The bankruptcy court conducted a hearing to consider both motions concerning the lease. The issues presented were (1) whether the lease had terminated prior to Pioneer's bankruptcy petition and (2) whether the debtor could satisfy the statutory requirements for assumption of the lease. The bankruptcy court decided that the lease had not terminated. The bankruptcy court granted Pioneer's motion to assume the lease and denied Cain Partnership's motion for stay relief.

Cain Partnership appealed to the United States District Court for the Eastern District of Tennessee. After the district court affirmed the bankruptcy court's decision, Cain Partnership appealed to the Sixth Circuit. During its appeal to the Sixth Circuit, Cain Partnership for the first time asserted that the bankruptcy court lacked subject matter jurisdiction to determine whether the lease had terminated. During the pendency of the Sixth Circuit appeal, Cain Partnership filed Rule 60 motions in the bankruptcy court and the district court challenging the bankruptcy court's jurisdiction to enter a final order. The district court denied the Rule 60 motion and Cain Partnership appealed the ruling to the Sixth Circuit.

The Sixth Circuit affirmed both decisions by the district court. It did not specifically reach the question of whether the proceeding was core or noncore. The court held that even if the proceeding were noncore, the bankruptcy court had jurisdiction to enter a final decision based on the parties' consent to jurisdiction.

MISSTATEMENTS OF LAW AND FACT IN PETITION FOR WRIT OF CERTIORARI

The petitioner has misstated aspects of the facts and law in this case. Contrary to the petitioner's assertions on page 8 of its petition, Cain Partnership did not overtly challenge the ability of the bankruptcy court to issue a final order in the proceedings concerning the partnership's motion to lift the stay and Pioneer's motion to assume the lease at the beginning of the bankruptcy case. The first time that Cain Partnership challenged the bankruptcy court's jurisdiction was in its Rule 60 motion, filed after its appeal to the Sixth Circuit. To the contrary, Cain Partnership expressly consented to the entry of a final order in its motion to lift the stay (App. A), its memorandum in support of that motion (App. B), and the pretrial order (App. A, Petition for Writ of Certiorari). Petitioner persists in making the false

assertion of "no consent" to the bankruptcy court's jurisdiction throughout its petition.[2]

Similarly, petitioner asserts that it was "not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was core or noncore, or with respect to consent." (Petition for Writ of Certiorari, p. 7). Not only did petitioner have an opportunity to express an opinion, petitioner did express the opinion that the bankruptcy court had jurisdiction to enter a final order in these proceedings (App. A, App. B, App. A in Petition for Writ of Certiorari).

Petitioner has also misstated the Sixth Circuit's opinion in this case. The Sixth Circuit did not hold that *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), prohibited the proceeding from being classified as core, as stated on page 3 of the petition. The Sixth Circuit held that even if the proceeding were noncore, the bankruptcy court had jurisdiction to issue a final order because the parties had consented.[3] The Sixth Circuit never stated that "the bankruptcy judge below could not, consistent with Northern Pipeline, enter a final order in Cain's lease dispute, notwithstanding that it arose in a 'core proceeding,' " as asserted on page 11 of the petition.

SUMMARY OF ARGUMENT

It does not violate Article III of the Constitution for a bankruptcy court to issue a final order in a core proceeding. Motions to lift the automatic stay and to assume leases are core proceedings. Even if these proceedings were noncore, the parties expressly consented to the entry of a final order of the bankruptcy

---

2. *See* Petition for Writ of Certiorari, pages 7 and 26-27.

3. *See* note 1, *supra*.

court, which is also constitutionally permissible. In view of the clear evidence of express consent in this case, this case is not the proper vehicle for deciding issues of implied consent.

REASONS FOR DENYING THE WRIT

I.

IT DOES NOT VIOLATE ARTICLE III OF THE CONSTITUTION FOR A BANKRUPTCY COURT TO ISSUE A FINAL ORDER IN A CORE PROCEEDING UNDER BAFJA.

This Court has previously confronted the issue of the constitutionality of the federal bankruptcy laws. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court held that "Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising under state law, without consent of the litigants, and subject only to ordinary appellate review." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 584 (1985). Thus, this Court held that the Bankruptcy Act of 1978 was unconstitutional. *Northern Pipeline*, 458 U.S. at 84.

In response to *Northern Pipeline*, Congress enacted BAFJA. *In re Production Steel*, 48 Bankr. 841, 845 (M.D. Tenn. 1985).[4]

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4. Many lower courts have held that BAFJA is constitutional. *See In re Rheuban*, 128 Bankr. 551, 563 (Bankr. C.D. Cal. 1991) (listing cases). In addition, seven circuit courts have held that the Emergency Rule, promulgated by Congress to fill the gap after *Northern Pipeline* until BAFJA, was constitutional. *In re Hansen*, 702 F.2d 728 (8th Cir. 1983); *White Motor Corp. v. Citibank*, 704 F.2d 254 (6th Cir. 1983); *In re Braniff Airways*, 700 F.2d 214 (5th Cir.), *cert. denied sub nom., American Airlines v. Braniff Airways*, 461 U.S. 944 (1983), (Cont'd)

Congress vested the judicial power exercised under Title 11 in the district courts. 28 U.S.C. § 1334. Bankruptcy judges are selected by the circuit courts of appeals. 28 U.S.C. § 152(a)(1) and (e). District courts may refer proceedings arising under Title 11 or related to a case under Title 11 to a bankruptcy court. 28 U.S.C. § 157(a). Even after referral of bankruptcy cases, district courts retain the power to withdraw the reference on their own motions or upon the motion of any party for cause. 28 U.S.C. § 157(d). Bankruptcy judges may only enter final orders in core proceedings. 28 U.S.C. § 157(b). In noncore proceedings, bankruptcy judges may only enter proposed findings of fact and conclusions of law absent consent of the parties. 28 U.S.C. § 157(c). All orders of the bankruptcy courts are appealable to district courts. 28 U.S.C. § 158.

Petitioner's main argument is that the referral of core proceedings to non-Article III bankruptcy courts is unconstitutional. Core proceedings, under the Bankruptcy Code, are those matters at the core of the adjustment of debtor-creditor relationships. Core proceedings include:

> A. Matters concerning the administration of the estate;
>
> B. *Motions to terminate, annul or modify the automatic stay;*
>
> C. *Orders approving the use or lease of property, including the use of cash collateral;*

(Cont'd)

Coastal Steel v. Telghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir.), *cert. denied*, 464 U.S. 938 (1983); *Salomon v. Kaiser*, 722 F.2d 1574 (2d Cir. 1983). BAFJA codified the Emergency Rule with only one change: the standard of review in core proceedings. *In re Tom Carter Enterprises*, 44 Bankr. 605, 609 (C.D. Cal. 1984).

> D. Other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

28 U.S.C. § 157(b)(2) (emphasis added). Thus, the proceedings involving Pioneer and Cain Partnership were clearly core.

Core proceedings listed in 28 U.S.C. § 157 involve public rights as this Court has used that term. Public rights do not require a dispute between the government and an individual. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 586 (1985); *Granfinanciera v. Nordberg*, 492 U.S. 33, 54 (1989). This Court looks to substance, rather than form, to determine whether public rights are at issue. *Thomas*, 473 U.S. 587. "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Id.* at 593.

Motions to assume an unexpired lease or terminate the automatic stay involve public rights. The right of a debtor to reorganize its affairs in bankruptcy is a federal right explicitly recognized both by the Constitution and Congress. *In re Skinner*, 917 F.2d 444, 449 (10th Cir. 1990) (quoting *In re Walters*, 868 F.2d 665, 670 (6th Cir. 1989)). "The imposition of an automatic stay by the bankruptcy court is central to the exercise of that right." *Id.* Congress designed the automatic stay to protect the debtor from its creditors and give the debtor the necessary breathing room to reorganize its affairs and emerge as a productive member of society. *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir. 1986). The importance

of the automatic stay is set forth in the legislative history of 11 U.S.C. § 362:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H. Rep. No. 95-595, 95th Cong., 2d Sess. 340-2; S. Rep. No. 95-989, 95th Cong., 2d Sess. 54-55, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5840-41 and 6296-7. A motion to terminate the stay directly affects the debtor's rights to protection under the federal bankruptcy laws. It would be virtually impossible to restructure the debtor's affairs if the bankruptcy court could not determine whether to continue the automatic stay over the objection of creditors.

The only reason advanced by petitioner for according the dispute in this case "private rights" status is that the resolution of the issue requires referral to state law. Many aspects of bankruptcy law depend on a determination of state law — *i.e.*, whether a creditor is secured or unsecured, what constitutes property of the estate, and whether a creditor holds an allowable claim. "There is no reason inherent in separation of powers principles to accord the state law character of a claim talismanic power in Article III inquiries." *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 853 (1986). Federal bankruptcy law incorporates many aspects of state commercial law to discourage forum shopping. *Butner v. United States*, 440

U.S. 48 (1979).[5] The state law aspects of the lease dispute do not prevent this Court from finding that the motions for lease assumption and for relief from the automatic stay involve "public rights."

In both cases in which this Court has held that the dispute in the bankruptcy court was a private right, not a public right, the debtor or trustee pursued actions to augment the bankruptcy estate. *Northern Pipeline* involved a breach of contract action initiated by the debtor to increase the assets available for creditors. *Northern Pipeline*, 458 U.S. at 56. In *Granfinanciera*, the trustee brought an action to set aside a fraudulent conveyance. *Granfinanciera*, 492 U.S. at 36. These actions "more nearly resemble state law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res." *Id.* at 56. In contrast, Cain Partnership sought to recover the leased premises from the debtor. The debtor was in possession of the property subject to the leasehold estate. The leasehold was the single most valuable asset of the debtor. Pioneer sought to assume the lease as part of its reorganization — a right granted the debtor in 11 U.S.C. § 365. This action was clearly part of the central core of traditional bankruptcy law, not merely a state law contract dispute. Thus, as a public right, the motion for relief from the stay could be adjudicated in a non-Article III forum.

The congressional definition of core proceedings is not so vague as to be unconstitutional. The purpose of the "void for vagueness" doctrine is to ensure fair warning of the effect of a statute and to prevent standardless enforcement. *Kolender v.*

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5. In fact, the Fifth Amendment requires Congress to keep the changes in creditor's rights through bankruptcy laws to a minimum. *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U.S. 440 (1937).

Lawson, 461 U.S. 352, 357 (1983). The Constitution does not require complete specificity in legislation. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947). At times the legislature must use general terms in a statute because the various behaviors required or prohibited cannot be described or listed adequately. *Id.* The definition of core proceedings in 11 U.S.C. § 157 is sufficiently definite to give notice as to what actions will be deemed core proceedings and thereby passes constitutional muster.

The Constitution does not prohibit Congress from allowing bankruptcy courts to determine whether a proceeding is core or noncore. Courts often determine their own jurisdiction. *In the Matter of Visioneering Construction*, 661 F.2d 119, 122 (9th Cir. 1981). The decision by the bankruptcy court is appealable. Prior to a decision by the bankruptcy court, a party also has the option of making a motion in district court to withdraw the reference to the bankruptcy court. 28 U.S.C. § 157(d). There is no danger that bankruptcy courts will, by making a determination of their own jurisdiction, extend their jurisdiction beyond permissible limits.

Petitioner's argument that the definition of "core" and/or "public rights" is too nebulous for bankruptcy courts to make a determination on this issue does not bear scrutiny. The same argument could be made for other areas of constitutional law such as personal jurisdiction over nonresident defendants. Though it may be a difficult area of law, lower courts make these determinations daily.

This Court should refuse to grant petitioner's request for a writ of certiorari because there are no constitutional problems with the bankruptcy courts deciding core proceedings under the scheme Congress devised. All other issues presented by the

petitioner are frivolous.[6]

In summary, the Sixth Circuit did not hold that Cain Partnership's motion for relief from the automatic stay and Pioneer's motion to assume the lease were noncore proceedings. The lower courts' holdings that the proceedings were core were not reversed. Thus, the question of whether Cain Partnership consented to the bankruptcy court's jurisdiction should not be properly raised before this Court. Even if that question were before this Court, the Court should refuse to grant the writ because (1) Cain Partnership expressly consented to jurisdiction, and (2) even if there were no express consent, Cain Partnership's consent to a final decision by the bankruptcy court may be implied.

II.

CAIN PARTNERSHIP EXPRESSLY CONSENTED TO THE JURISDICTION OF THE BANKRUPTCY COURT.

Contrary to its assertions on page 7 of the petition, Cain Partnership knew that the bankruptcy court considered the stay relief motion to be a core proceeding before receiving the bankruptcy court's memorandum opinion on the lease dispute.

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6. For example, the fifth and eighth issues presented by petitioner, which concern the alleged inherent challenge to jurisdiction of the bankruptcy court and the takings clause of the Fifth Amendment, are totally without merit. As stated earlier, the Bankruptcy Code allows the bankruptcy judge to extend the deadline for deciding a motion for relief from the stay. 11 U.S.C. § 362(c). Petitioner entered an agreed pretrial order extending the period in which the bankruptcy court had to decide Cain Partnership's motion for relief from the stay (App. A, Petition for Writ of Certiorari). In its motion to lift the stay, Cain Partnership asked the bankruptcy court to order Pioneer to turn over the leased premises (App. A). In support of its stay relief motion, Cain Partnership told the bankruptcy court that it had the authority to grant the relief it sought — turnover of the property (App. B).

In the pretrial order, Cain Partnership expressly agreed that the automatic stay would remain in effect until further orders of the Court "pending a final decision of the Court on the motion of The Cain Partnership, Ltd. to lift the stay." (App. A, Petition for Writ of Certiorari). Moreover, Cain Partnership, in its brief in support of its motion to lift the stay, stated that the bankruptcy court had jurisdiction to decide the matter and, if the court decided in Cain Partnership's favor, to require Pioneer to turn over the leased premises (App. B). In its motion to lift the stay, Cain partnership asked the court to order Pioneer to turn over the property (App. A). Even the cases cited by petitioner as rejecting implied consent to a final decision in a noncore matter by the bankruptcy court agree that parties can expressly consent to the bankruptcy court's entry of a final order. *In re Brickell Investment Corp.*, 922 F.2d 696, 701-02 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136, 1141-42 (11th Cir. 1990); *The Home Insurance Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746, 749 (7th Cir. 1989). Clearly, Cain Partnership expressly consented to the entry of a final order by the bankruptcy court.

The bankruptcy court's determination of certain noncore disputes related to a bankruptcy case with the consent of the parties does not "impermissibly threaten[ ] the institutional integrity of the Judicial Branch." *Schor*, 478 U.S. at 851. In noncore proceedings, the bankruptcy court acts as an adjunct to the district court. The district court always retains the power to withdraw the reference to the bankruptcy court and to review the bankruptcy court's decision on appeal. 28 U.S.C. § 157. This situation is closely analogous to the Federal Magistrate's Act, approved by this Court in *United States v. Raddatz*, 447 U.S. 667 (1980). Therefore, there is no compelling reason for this Court to grant a writ of certiorari in this case.

III.

CONSENT TO ENTRY OF A FINAL ORDER BY THE BANKRUPTCY COURT IN NONCORE PROCEEDINGS CAN BE IMPLIED.

The circuit courts for the second, sixth and ninth circuits have held that consent to the entry of final orders by the bankruptcy courts in noncore proceedings can be implied. *In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987); *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987); *In re Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). Section 157(c)(2) does not require express consent. 28 U.S.C. § 157(c)(2). Moreover, protests over jurisdiction only at the circuit level "more closely resemble[ ] an afterthought than a bona fide objection." *In re Men's Sportswear*, 834 F.2d at 1138. Cain Partnership's failure to object to the entry of a final order by the bankruptcy court even though it had numerous opportunities to do so, should be deemed consent.

Although there may be a split among the circuits regarding whether consent to a final adjudication of a noncore matter by the bankruptcy court may be implied, because of the very clear facts this case is not the proper vehicle for this Court to resolve the conflict. Without a doubt, through the express assertions of Cain Partnership in its motion for stay relief, its brief in support thereof, and its execution of the agreed pretrial order, Cain Partnership expressly consented to the jurisdiction of the bankruptcy court. This Court should not use this case of express consent to make a determination about implied consent.

CONCLUSION

This Court should refuse to grant a writ of certiorari in this case because petitioner has not presented issues required to be resolved by this Court.

Respectfully submitted,

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APPENDIX A — PETITIONER'S MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 3-89-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION BY THE CAIN PARTNERSHIP, LTD. TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

COMES NOW The Cain Partnership, Ltd. (hereinafter "the Partnership"), and respectfully moves the court to lift the stay entered by the order of relief pursuant to Title 11, *United States Code* § 362(a) to permit the Partnership to repossess certain real property hereinafter described and to order Debtor to turnover said property to the Partnership.

FOR CAUSE the Partnership would show that the Partnership is the former landlord of debtor-in-possession (hereinafter "Debtor") with respect to the 93.85 acres of the 95.5 acres more particularly described in that certain lease (hereinafter "**the Lease**"), attached as **Exhibit A** hereto, signed between the Partnership and Colonial Enterprises, Inc. (hereinafter "Colonial") on April 11, 1974.

Appendix A

FOR FURTHER CAUSE, the Partnership would show that, on April 1, 1977, the Lease was amended (Knox County Register's Office, Book 1771, Pages 836-840: Instrument No. 16500) to grant Colonial an additional 55 years of renewal options and, as consideration for the extended option period, Colonial conveyed to the Partnership the Colonial leasehold on 1.65 acres (now Parcel 29.01 on Map 132) of the 95.5 acres which reduced the premises demised by the Lease to Colonial to 93.85 acres (hereinafter "the demised premises").

FOR FURTHER CAUSE, the Partnership would show that Debtor claims that, by a document entitled "Assignment of Lease" (Knox County Register's Office Book 2094 Pages 077-078), the leasehold of Colonial with respect to 5.71 acres (now Parcel 29.04 on Map 132) of the 95.5 acres originally demised by the Lease was transferred by assignment by Colonial to persons other than Premiere Investment Properties, Inc. (the Debtor's predecessor and assignor to Debtor, as assignee) so that, according to Debtor's claim, the premise demised to Debtor by the Lease was made up of approximately 88.14 acres [i.e., 95.5 - (1.65 + 5.71) = 88.14]; however, the aforesaid "Assignment of Lease" is nothing, at most, more than a misnomered sublease, did not remove from the premises currently demised by the Lease any acres, and Debtor remained, until the Lease terminated, obligated to pay the taxes and perform other obligations of the Lease and common law with respect to the 93.85 acres, including the 5.71 acres of Parcel 29.04, demised to Debtor by the Lease.

FOR FURTHER CAUSE, the Partnership would show that Debtor now is in possession of the demised premises (93.85 acres).

FOR FURTHER CAUSE, the Partnership would show that the leasehold evidenced by the Lease is not "property," as defined

in Title 11, *United States Code* § 541(b)(2), of Debtor's estate and that the Partnership has exclusive right of possession to the demised premises.

FOR FURTHER CAUSE, the Partnership would show that Debtor has succeeded to the interest of Colonial in the Lease (Exhibit A hereto) by virtue of an an assignment from Premiere Investment Properties, Inc. (hereinafter "PIP") and a sublessee of PIP (Premiere Development Properties I, Inc.) in April 1987.

FOR FURTHER CAUSE, the Partnership would show that, aside from the April 1, 1977 amendment extending options to renew in exchange for Colonial's leasehold on 1.65 acres (Parcel 19.04 Map 132) of the 95.5 acres originally demised, there have never been any changes in the obligation of the Partnership, to Colonial nor any assignee which holds through Colonial nor in the obligations of Colonial nor any assignee holding leasehold rights from or through Colonial to the Partnership; therefore, the terms stated in the Lease (Exhibit A hereto) are now, and, at all times since the inception of the Lease (Exhibit A hereto), have remained the same; therefore, Debtor, since stepping into the shoes of Colonial by virtue of the assignment from PIP and Premiere Development Properties I, Inc. in April 1987, continuously and uninterruptedly, has been bound to perform all of the obligations undertaken by Colonial on April 11, 1974.

FOR FURTHER CAUSE, the Partnership would show that the explicit terms of the Lease (Exhibit A hereto), continuously and uninterruptedly, have required Debtor, since assuming the obligations of Colonial under the Lease (Exhibit A hereto), to promptly pay when due all real property taxes on the demised premises.

Appendix A

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) does not require the Partnership to provide Colonial (nor, therefore, any assignee holding leasehold rights and obligations of Colonial) notice of a default nor does the Lease (Exhibit A hereto) require either that an event of default persist for any specified period of time in order to terminate the leasehold of Colonial (and, therefore, any assignee holding the leasehold rights and obligations of Colonial) under the Lease.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto), in pertinent part, provides as follows:

> THIS LEASE [Exhibit A hereto], made and entered into this 11th day of April, 1974, . . ., That for and in **consideration of** the covenants and **conditions herein contained,** ***to be kept and performed*** **by the Lessee** [Colonial],; the Lessor [the Partnership] does hereby let, grant and lease . . . .
>
> * * *
>
> To have and to hold the aforesaid premises unto the Lessee for the term aforesaid, **subject to the terms and conditions** stated herein.
>
> * * *
>
> **As** further **consideration** for said Lease [Exhibit A hereto], and in addition to the monthly payment provided for herein, the **Lessee shall pay all real property taxes** assessed against said property by taxing authorities during the term of this lease and

Appendix A

any renewal thereof. Said taxes shall be paid ***promptly when due*** during the entire term.

* * *

The following **additional conditions** and stipulations are hereby declared to be a part of this lease [Exhibit A hereto], for the performance of which the parties hereto bind themselves:

* * *

5. Should the Lessor be forced to undertake legal action to enforce its rights upon the breach of the obligations of this lease [Exhibit A hereto], then the **Lessee agrees to pay** the Lessor's reasonable **attorney's fees.**

FOR FURTHER CAUSE, the Partnership would show that, from its inception until its termination, the Lease was a nonresidential lease, i.e., a commercial ground lease of real property for none but commercial use.

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to the City of Knoxville, Tennessee $1,660.29 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $36,239.34 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

Appendix A

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to Knox County, Tennessee, $1,347.76 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to Knox County, Tennessee $7,416.08 in real property taxes for that portion of the demised premises known as Parcel **02902** (see **Exhibit B** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to the City of Knoxville, Tennessee $6,092.80 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $16,432.63 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1987, there became due to Knox County, Tennessee $4,945.92 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to Knox County, Tennessee $5,214.72 in real property taxes for that portion of the demised premises known as Parcel **02910** (see **Exhibit C** hereto).

FOR FURTHER CAUSE, the Partnership would show that, on October 1, 1988, there became due to the City of Knoxville, Tennessee $681.92 in real property taxes for that portion of the

demised premises known as Parcel **02903** (see **Exhibit D** hereto).

FOR FURTHER CAUSE, the Partnership would show that the real property taxes more particularly described in the nine immediately preceding paragraphs hereof were required by the Lease to be paid "promptly" on the date "when due" by Debtor; yet, Debtor did not pay said real property taxes "promptly" and "when due" or at any other time thereafter.

FOR FURTHER CAUSE, the Partnership would show that the total amount of real property tax, above specified, if it had been paid by Debtor when due, was $80,031.46.

FOR FURTHER CAUSE, the Partnership would show that, upon becoming delinquent, the above-specified property taxes, to be satisfied, required the payment of interest, which accrues and accumulates daily, and, in some cases, assessment of attorney's fees and court costs.

FOR FURTHER CAUSE, the Partnership would show that failure to pay the above-stated real property taxes, when due, creates on the demised premises a tax lien or the possibility of a tax lien which encumbers and subjects the real property to the possibility of forfeiture by the taxing authorities to satisfy the taxes.

FOR FURTHER CAUSE, the Partnership would show that, in order to liquidate the total indebtedness for past due real property taxes, interest and attorneys fees and, thereby, to remove tax liens or the possibility of same and subjection of the demised premises to forfeiture, on May 2, 1989, the Partnership paid ($67,673.05 to the City of Knoxville, Tennessee and $21,588.31 to Knox County, Tennessee) the total sum of $89,261.36.

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FOR FURTHER CAUSE, the Partnership would show that continuously, since October 2, 1987, the Lease (Exhibit A hereto) has been terminated because of the failure of Debtor to abide by its contractual promise to pay real property taxes promptly, when due.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) provides as follows in enumerated paragraph 1 on page 3:

> This lease may be assigned or the leased premises may be sublet in whole or in part **for any lawful purpose** at the will of the Lessee.

And continuing as follows in enumerated paragraph 3 on page 4:

> The Lessee agrees that its use of the leased premises will **not violate any statute or ordinance,** municipal, state or federal.

FOR FURTHER CAUSE, the Partnership would show that the Lease (Exhibit A hereto) is terminated because part of the demised premises has been, for an extended period of time, continuously used for an unlawful purpose and in violation of statutes of the State of Tennessee.

Respectfully Submitted,

LARRY E. PARRISH, P.C.,
Attorneys for The Cain
Partnership, Ltd.

Appendix A

s/ Larry E. Parrish
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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Appendix A

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Appendix A

by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish

APPENDIX B — PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 389-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION OF THE CAIN PARTNERSHIP, LTD. IN SUPPORT OF ITS MOTION TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

PREFACE

The issue created by the "Motion To Lift The Stay To Permit Movant To Repossess The Premises Formerly Demised By The Colonial Enterprises Lease And For An Order To Remove Debtor-In-Possession From Said Premises" (herinafter "Partnership's Motion") is simple to state, and there exists conclusive authority resolving the issue. The **issue is:** Did the April 11, 1974 lease, as amended, between The Cain Partnership, Ltd. and Colonial Enterprises, Inc. (hereinafter "the Lease") terminate prior to the date (April 12, 1989) on which Debtor filed its petition for relief in the instant case?

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If, as The Cain Partnership, Ltd. (hereinafter "the Partnership") contends, the posited question must be answered in the affirmative, the former leasehold represented by the Lease, to which Debtor was the assignee, is not property of the bankruptcy estate of Debtor. If, as the Partnership also contends, the former leasehold is not property of Debtor's estate, the automatic stay pursuant to Title 11, *United States Code* § 362(a) does not bar the Partnership from regaining possession.

A subsidiary issue involves whether this court has jurisdiction to require Debtor to turn over the formerly demised premises to the Partnership. It is the contention of the Partnership that the court has sufficient jurisdiction over Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances.

STATUS OF CASE

On April 12, 1989, Pioneer Investment Services Company, Debtor-In-Possession (hereinafter "Debtor") voluntarily filed a Petition for Relief in the instant case. Concomitantly therewith, the automatic stay mandated by Title 11, *United States Code* § 362(a) became effective enjoining claims against or to the estate of Debtor.

The Partnership's Motion, which this memorandum supports, sets out the facts which the Partnership is prepared to prove. To repeat those facts here would be duplicitous. Therefore, the factual presuppositions underlying the remainder of this memorandum are those which appear in and as a part of the Partnership's Motion.

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PROCEDURAL APPROPRIATENESS OF INSTANT MOTION

At first blush, there might appear to be a logical inconsistency in the contention by the Partnership that, at the same time, the Lease is not "property" of the estate which is protected by the § 362 automatic stay and that the court should lift the § 362 automatic stay in order to allow the Partnership to obtain possession of it. However, the breadth and penal nature of the automatic stay requires the present procedure. The Partnership is enjoined by the § 362 stay from even giving notice to Debtor to remove itself from the demised premises. This subject has been addressed by case authority in the past.

In particular, the following language is instructive as it appears in *In re: Pagoda International, Inc., Debtor,* 26 B.R. 18 (Bankr. D.Md. 1982) at 20:

> Thus, as pointed out by Pagoda in its brief, it does have a scintilla of equitable interest in the premises. *In Re Andorra Meat Market, Inc.,* 7 B.R. 744, 746 (B.E.D. Pa. 1980). It is this scintilla of interest that triggered the protection of § 362(a). Having the protection in place, it then became incumbent upon the landlord, as it did here, to proceed with this action. *In Re Lewis,* 15 B.R. 643 (B.E.D.Pa. 1981). The situation is not unlike that discussed by Judge Kahn in *Matter of Mimi's of Atlanta, Inc.,* 5 B.R. 623, 627 (B.N.D.Ga. 1980). There, the court noted that even though the leases had been terminated the debtors had a **tenancy by sufferance**.

Bankruptcy Judge William Houston Brown recently

recognized that Tennessee law, likewise, considers such a tenant to be a tenant at sufferance, saying so in *In Re: Memphis-Friday's Associates, Debtor,* 88 B.R. 830 (Bankr. W.D.Tenn. 1988) at 837:

> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. . . . [I]n fact, it has been held that where a lessee remains in possession following default and consequent termination of the lease, the lessee is a **"tenant at sufferance"** of the lessor. *See,* e.g., *In re Maxwell,* 40 B.R. 231, 237 (Bankr. N.D.Ill. 1984); *Metropolitan Life Ins. Co. v. Moore,* 167 Tenn. 620, 72 S.W.2d 1050, 1051 (1934).

Reference directly to the opinion in *Metropolitan Life Ins. Co. v. Moore, supra,* further establishes the proposition saying as follows in 167 Tenn. at 624:

> At common law a mortgagor holding possession "after condition broken" is a "tenant at sufferance" of the mortgagee, according to *Underhill on Landlord and Tenant,* sec. 167; *Fuller v. Wadsworth,* 24 N.C. (2 Ired), 263, 38 Am.Dec., 692; *Ford v. Steele,* 54 Vt., 562.

For more detail with respect to the parameters of rights of a tenant at sufferance is available in 51 C.J.S., *Landlord and Tenant,* p. 779, § 175 et seq. and by reference to the discussion in *Knight v. Haley,* 176 A. 461, 464 (Del. 1934).

One distinction with respect to a tenant at sufferance is that one occupying leased premises as such has neither a legal nor an

equitable interest in the demised premises. *Hughes v. Monnahan,* 282 Minn. 407, 165 N.W.2d 231, 233 (1969). The fact that a debtor which is a tenant at sufferance possesses no interest in the occupied premises which is of any benefit to any creditor of debtor is indicated by the following language from *In re Pagoda International Inc., Debtor, supra,* 26 B.R. at 20:

> The fact that the state processes have not been completed as to Pagoda does not mean that any interest is left other than the common law tenancy at sufferance. In fact, it is not a tenancy, but **permissive occupation.** It **is inalienable** by Pagoda.

In the context of discussing the inalienability of the rights of one tenant by the entirety in Tennessee, this court, twice previously, has found occasion to recognize that whatever interest a debtor in bankruptcy has as a mere tenant by the entirety is inalienable and, because of this, that interest is not part of the bankruptcy estate. *In re Garretson,* 6 B.R. 127 (Bankr. E.D.Tenn. 1980); *In re Dawson,* Debtor, 10 B.R. 680 (Bankr. E.D.Tenn. 1980).

In bankruptcy, the issue of what a debtor possesses as a tenant at sufferance has been many times discussed, and, each time, the result is the same. While the interest might be enough to initially trigger the protection of a § 362(a) automatic stay, it is not enough to allow the right which initially enabled the debtor to occupy previously demised premises to be considered "property" of the bankruptcy estate. *David L. Trask, Trustee in Bankruptcy of Magic Spuds, Inc.,* 376 F.2d 17, 20, 21 (5th Cir. 1967); *In re Maxwell, Jr., Debtor,* 40 B.R. 231, 236, 237, 238 (Bankr. N.D. Ill. 1984); *In re Masterworks, Inc., Debtor,* 94 B.R. 262, 265, 266, 267 (Bankr. D.Conn., 1989); *In re M & R Apparel, Inc.,*

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Debtor, 92 B.R. 565, 568, 569 (Bankr. D. Conn 1988); *In re Memphis-Friday's Associates,* 88 B.R. 830, 837, 840, 841, 842, 843 (Bankr. W.D. Tenn. 1988); *In re Ahrens, Debtors,* 64 B.R. 5, 6, 7 (Bankr. E.D.Pa. 1986); *In re Black, Debtor,* 58 B.R. 60, 61, 62 (Bankr. E.D.Pa., 1986); *In the Matter of: Condominium Administrative Services, Inc., Debtor(s),* 55 B.R. 792, 795, 796, 797, 798, 799 (Bankr. M.D.Fla. 1985); *In re Players' Pub, Inc., Debtor,* 45 H.R. 387, 391, 392, 393 (Bankr. D.Mass. 1985); *In re Gray, Debtors,* 37 B.R. 532, 535, 536, 537 (Bankr. N.D.Ga. 1984); *In re Doan's Truck Repair, Inc., Debtor,* 34 B.R. 180, 183) (Bankr. D.Wy. 1983); *In re Foxfire Inn of Stuart Florida, Debtor,* 30 B.R. 30, 31, 32 (Bankr. S.D.Fla. 1983); *In re Pagoda International, Inc., Debtor,* 26 B.R. 18, 20, 21, 22 (Bankr. D.Md. 1982); *Executive Square Office Building v. O'Connor And Associates, Inc.,* 19 B.R. 143, 146, 147, 148, 149 (Bankr. N.D.Fla. 1981); *In re Victory Pipe Craftsmen, Inc., Debtor,* 8 B.R. 635, 636, 637 (Bankr. N.D.Ill., E.D. 1981).

It is generally held that a tenant at sufferance, as a permissive occupant of formerly demised property, has no further entitlement to permissive occupancy after receiving notice from the owner to turnover. In the instant case, the Partnership did not give notice prior to the April 12, 1989 filing of the petition in this case. However, on the present state of the record, the Partnership is automatically enjoined from giving such a notice. But, it is generally conceded that the filing a public proceeding with service on a party to the proceeding is considered notice. Therefore, the Partnership's Motion, under any scheme of things, constitutes permissible notice to Debtor.

Hyper-technicality might dictate that the Partnership be given partial release from the automatic stay to give Debtor notice to quit the formerly demised premises. If Debtor refused to heed

the notice, the Partnership might be required to come back to this court to seek a further partial lifting of the automatic stay to allow the Partnership to commence state court proceedings to oust Debtor. Such a process might be subject to classification as form over substance.

In order for this court to determine whether any lifting of the stay, in response to the Partnership's Motion, is appropriate, it will have to determine whether or not the Lease terminated prior to April 12, 1989, the filing date of Debtor's Chapter 11 petition. That is, if the Lease did not terminate, it constitutes an unexpired lease which Debtor is entitled to affirm or reject provided certain other conditions are met.

Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might more simply be accomplished by this court.

STATUTORY PROVISIONS IMPLICATED

In pertinent part, Title 11, *United States Code* § 362 provides as follows:

> (a). . . . [a] petition filed . . . operates as a stay, applicable to all entities of —

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* * *

(3) any act to obtain possession of . . . property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(c) . . . (1) the **stay** of an act against property of the estate under subsection (a) of this section **continues until** such property is no longer property of the estate;

* * *

(d) On request of a party in interest and after notice and a hearing, the **court shall grant relief from the stay** provided under subsection (a) of this section, such as by terminating, . . . such stay- . . . (2) with respect to a stay of an act against property under subsection (a) of this section, **if** — (A) the **debtor does not have an equity** in such property; . . . .

In pertinent part, Title 11, *United States Code* § 365(c) states as follows:

The trustee **may not assume** . . . any . . . unexpired **lease** of the debtor, . . ., **if** — . . . (3) such lease is of nonresidential real property and has been **terminated** under applicable nonbankruptcy law **prior to the order for relief.**

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In pertinent part, Title 11, United States Code § 541(b)(2) states as follows:

> Property of the estate does not include — . . . (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under the lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

GOVERNING CASELAW

There are certain governing rules which are universally accepted and which have present application so that mere statement of them is here sufficient. These rules are recognized in an article entitled "The Postpetition, Pre-Rejection, Pre-Assumption Status of An Executory Contract" which appears in 59 *American Bankruptcy Law Journal* 197 (1985). Quotation of the rule with which the Partnership's Motion is most concerned might be helpful. This appears in 59 ABLJ at 201:

> (1) *May the DIP resurrect an executory contract that terminated prior to the filing of the Chapter 11 petition?* (emphasis in original)
>
> * * *
>
> To this question the answer is clearly no. The DIP may not reinstate, revive, or otherwise resurrect a contractual relationship that in fact ended prior

to the date of the filing. In such a case, there is no executory contract for the debtor to assume or reject.[19]

* * *

19. *See*, e.g., *In re Triangle Laboratories, Inc.*, 663 P.2d 463, 467-468 (3rd Cir. 1981) ("An executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor's assets."); *In re New Media Irjax, Inc.*, 19 Bankr. 199, 201 (Bankr. M.D.Fla. 1982) ("If the executory contract was effectively cancelled prior to the intervention of bankruptcy, there remains nothing for the Debtor to assume."); *In re Benrus Watch Co. Inc.*, 13 Bankr. 331, 334 (Bankr. S.D.N.Y. 1981) ("Contracts that have been effectively terminated prior to the filing of a chapter 11 petition cannot be revived by the bankruptcy court.").

Whether the contract which the DIP seeks to assume or reject actually expired prior to the date of filing is generally a question of state law, a point recognized by most courts.[20]

* * *

20. *See, Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied* 105 S.Ct.386 (1984): ("If a contract has been terminated pre-

> bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law.") *See also In re Bricker*, 43 Bankr. 344 (Bankr. D. Ariz. 1984).

In recent cases, Judge Lundin has commendably analyzed at what point, under Tennessee law, a **residential** lease expires under the Bankruptcy Code. Of course, an unexpired residential lease is specially protected by Title 11, *United States Code* § 362(b)(10). Under § 362(b)(10), a residential lease can be assumed by a debtor unless, pre-petition, the residential lease has **"expired."**

This is in contrast to the Bankruptcy Code provision with respect to nonresidential real property leases. With respect to **nonresidential** leases, a debtor is prohibited from assuming the benefits or obligations of such a lease if, pre-petition, the lease had **"terminated."** *See* Title 11, *United States Code* § 365(c)(3). Thus, an unexpired, but terminated, nonresidential lease cannot be assumed, post-petition, by a debtor.

Judge Lundin exhaustively concludes that a lease of residential property cannot be considered "expired" under Tennessee law until after execution of a Writ of Possession. *In re Talley*, 69 B.R. 219 (Bankr. M.D.Tenn. 1986); *In re Goodloe*, 61 B.R. 1016 (Bankr. M.D.Tenn. 1986). Of particular interest are the following words of Judge Lundin, quoted from *In re Talley, supra*, 69 B.R. at 223:

> It is doubtful that Congress intended to allow debtors to contract away trustee's power of

> assumption through a lease term which equates a default with "termination." **"Termination," "default" and "expired" are not coextensive;** to allow full equation would thwart the Congressional intent that trustees (and Chapter 13 debtors) may cure defaults for the benefit of the estate pursuant to § 365.

More recently, Bankruptcy Judge Brown has, with equal thoroughness as Judge Lundin, considered when, under Tennessee law, a nonresidential (commercial) lease is "terminated" for the purposes of Title 11, *United States Code* § 365(c)(3). *In re Memphis-Friday's Associates, supra.*

The *Memphis-Friday's* case involved a commercial lease of a restaurant. The debtor attempted to assume the lease after its Chapter 11 petition was filed. The landlord objected and based its objection on the contention that the lease terminated pre-petition. In support of its contention, the landlord established that, pre-petition, landlord gave debtor written notice dated April 18, 1988 that its lease would terminate on April 30, 1988 "due to debtors noncompliance with terms of the written lease." The lease provided a five day cure period for cure on non-payment of rent and a 10 day cure period for other breaches. However, though it was not discussed in the opinion, some of the breached (e.g., failing to obtain permission of the landlord before making repairs) were incurable. By way of background the court stated as follows in the *Memphis-Friday's* case:

> The undisputed evidence in the instant proceeding establishes that the Debtor **closed** its operation and commenced renovations at the restaurant on January 18, 1988. The renovations were

undertaken pursuant to a provision in the Debtor's modified franchise agreement with Friday's, Inc. that it would take steps necessary to conform its restaurant operation to the standards required by the franchisor. . . . At closing, the estimated time for completion of the renovations was two months, while the estimated cost was $250,000.00. The **Debtor failed to satisfy the lease** requirements **that it obtain permission** for renovations from the landlord, provide the landlord with specifications for the work to be done, and submit to the landlord performance and labor and material payment bonds or financial statements exhibiting a sufficient net worth of the Debtor, (citations omitted) . . . [t]he landlord sent notice of such failure, ... (citations omitted) Additionally, on March 1, 1988, the Debtor failed to make its rental payment for that month. Notice . . . with instructions to cure same, was sent and received, via certified mail, on March 16, 1988. (citations omitted)

On March 17, 1988, the Tennessee Department of Employment Security filed a lien against the Debtor's property . . . . (citations omitted) [c]ontractor performing the renovations . . . filed a materialmen's lien . . . . (citations omitted). [T]hese liens are alleged to be in further contravention of the lease.

On April 12, 1988, the Debtor again failed to pay its monthly rental and on April 18, 1988, the landlord sent the Debtor the "notice of Termination and Notice of Additional Defaults"

via certified mail. The notice specifies the above defaults and provides that in light thereof, the "Lease and Term thereof will terminate on April 30, 1988." (citations omitted).

Mr. Victor, an officer of the Debtor, Maruki Tennessee "F," Inc. and of Maruki U.S.A. Co. Inc. testified that he attempted several times to cure the defaults by proposing settlement offers but that the landlord "would not let him pay."

* * *

The equities do not favor this Debtor, . . . [T]he bankruptcy court is a court of equity. *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). 'It is, however, a court of equity under the law.' *In re Costell*, 75 B.R. 348, 353 (Bankr. N.D. Ohio 1987). The equity of the court does not reach to this Debtor, especially in view of the mandate of the Code. 11 U.S.C. Section 365(c)(3). As Justice White recently observed for the unanimous court in *Northwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 968-969 (1988): **'[w]hatever equitable powers remain in the bankruptcy courts must and can only he exercised within the confines of the Bankruptcy Code.'**

* * *

[T]he court concludes that the newer, specific Section 365(c)(3) governs over the older, more general Section 108(b). 'It is a well established

> maxim of statutory interpretation that when Sections of an act can be construed consonantly, the should be so interpreted.' *I.T.T. Small Business Finance Corp. v. Frederigue*, 82 B.R. 4, 6 (E.D. N.Y. 1987), citing, *Sutherland Stat. Const.* Sections 51.01, 51.02 (4th Ed.). However, a consonant reading may not always be possible. In *Bank of Commonwealth v. Bevan*, 13 B.R. 989 (E.D. MI. 1981), the District Court construed Section 108(b) to be more specific than Section 362(a) and thus Section 108(b) limited the automatic stay in that case. Id. at 994. However, in the case of Memphis-Friday's Section 365(c)(3) is more specific and limiting than Section 108(b). In *In re Eldorado, Inc.*, 85 B.R. 555, 557 (Bankr. D. Mont. 1987), the court reasoned that Section 108(b) did not act to extend time for curing of pre-bankruptcy defaults in executionary contracts. This is consistent with the Seventh Circuit in *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984), *cert denied*, 469 U.S. 982, 105 S.Ct. 386. As the *Moody* court observed: 'Section 365 specifically governs the time for curing defaults in executionary contracts, and thus, it controls here.

In the *Memphis-Friday's* case, Judge Brown found that the nonresidential lease there in question was terminated prior to the time when the debtor filed its Chapter 11 petition. Because the enunciation of Tennessee law by Judge Brown is definitive, with respect to the issue at hand, extensive quotation seems appropriate. Particularly, it is said as follows in *In re Memphis-Friday's Associates, supra*, 88 B.R. at 836-837:

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It is argued by the Debtor that, notwithstanding the above events, the lease has not been properly terminated under Tennessee law because termination requires actual re-entry by the landlord, commencement of a suit for possession, or issuance of a writ of possession. For this proposition, the Debtor cites the court to [citations omitted].

Each of these cases is readily distinguishable from the proceeding at bar in the first instance because they involve residential real estate. Unlike the proceeding sub judice, the cases cited by the Debtor involve a determination of when a debtor's leasehold or freehold interest in residential real estate is "expired" or "forfeited" rather than a determination of **when a non-residential lease is "terminated"** for purposes of Section 365(c). Accordingly, these cases stand for the proposition that a freehold interest is not forfeited prior to a foreclosure sale and that a lease is not "expired" prior to the issuance of a writ of possession pursuant to Tennessee law and when, for purposes of Section 365(a) of the *Bankruptcy Code*, the subject property is residential [citations omitted].

* * *

This line of reasoning was reiterated in the 1986 Pizza Pumps of America case, *supra*. There, the Tennessee Court of Appeals was faced with a commercial **lease** which **provided** that **no notice** of default **or opportunity to cure** was required for

> the lessor to treat the lease as forfeited when rental payments were overdue. The Court held that the lease was to be construed as written and as such, the **lessee had "lost all legal interest in the lease by forfeiture in not paying the rent on time."** (citation omitted)
>
> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. In addition, these cases clearly illustrate that a commercial lease may be **terminated** by the lessor **regardless of possession.**
>
> * * *
>
> In order to fully assess Debtor's rights under the Code, the court has considered whether the Debtor has complied with Section 365(b)(1). (footnote omitted) To reach this consideration, the court would be required to find that an unexpired lease existed for assumption by the Debtor, and **the court has found and concluded that there is no lease for assumption.**

Reference to *Pizza Pumps of America Inc. v. Krispy Kreme Doughnut Corporation, et al.*, 11 TAM 52-13 (Tenn.App., W.S., October 31, 1986), a copy of which is attached hereto, is helpful. For instance, the Court of Appeals stated as follows:

> Pizza Pumps filed its complaint alleging breach of contract and wrongful eviction on May 23, 1984. The Chancellor dismissed the complaint, and

awarded Krispy Kreme arrearages in rent and taxes, attorney's fees and costs on its countercomplaint.

The essential dispute between the parties is whether the lease, . . ., required that notice of default and opportunity to cure within thirty days be granted when rental payments were overdue. Krispy Kreme interprets the **lease** as allowing **no grace period to cure** a default from non-payment of rent, while **Pizza Pumps insists that it complied in good faith** with the terms of paragraph 15 in **tendering payment to cure.**

* * *

We find that this provision makes it clear that overdue rental payments cannot be extended by granting thirty days to remedy, absent the express written consent of the lessor.

* * *

We **do not doubt** that Vella, the president of **Pizza Pumps, subjectively interpreted the lease in this manner;** however, the written terms of the lease must control: in the absence of fraud or mistake, a contract must be interpreted and enforced as written **even though** it contains terms which may be thought **harsh and unjust.** *Ballard v. North American Life & Casualty Co.*, 667 S.W.2d 79, 82 (Tenn. App. 1983).

* * *

Appendix B

> **We hold** that the written language of paragraph 15, taken as a whole, must be construed to mean that **no notice** of default **and opportunity to cure is required** when rental payments are overdue. Therefore, the lessor could properly choose its option of treating the lease as forfeited, null, and void upon failure to **pay** rent installments **when due.**
>
> Pizza Pumps urges that **estoppel** by course of dealing, i.e., **by accepting late rental payments in the past,** should prevent Krispy Kreme from revoking its leasehold rights. However, our construction of the lease makes it apparent that Pizza Pumps **lost all legal interest in the lease by forfeiture in not *paying* the rent *on time.*** **Estoppel** may be urged to protect a right, but it **can never create a right.** *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S.W.2d 683, 684 (1934). (emphasis added)

The rule articulated in the *Memphis-Friday's* case and in the *Pizza Pumps* case is not without historical underpinning. To the contrary, though Judge Brown and Judge Highers found it unnecessary in opinions in *Memphis-Friday's* and *Pizza Pumps* to trace the historical roots dictating the results reached with respect to when the lessees under those commercial leases lost all legal rights deriving from the subject leases, what resulted was simply application of plain vanilla law longstanding and entrenched in Tennessee. The essence of the *Memphis-Friday's* and the *Pizza Pumps* rulings is that a commercial lease is nothing more and nothing less than a contract between the lessor and the lessee. The courts took note of the fact that there were no statutory

provisions which gave special protections to such (non-residential) lease/contracts. Also, at least by implication, the courts essentially proceeded on the assumption that there was no disparity in bargaining power at the inception of the commercial leases which required evening-up in order for the law to provide equal footing to the contracting parties. Therefore, the courts, in *Memphis-Friday's* and *Pizza Pumps*, essentially, applied standard common law contract principles as the means by which to resolve the disputes.

One of those standard common law contract doctrines is known as the first breach. A recent and succinct statement of the rule may be found in *Sage of America Company v. Lucey Boiler Company,* TAM ____ (Tenn.App. W.S. October 9, 1987) perm. app. den. January 25, 1988, where the court states as follows in its slip opinion:

> A party who is determined to be in material breach of a contract has no right to rely on the contract terms. The non-breaching party has no further obligation to perform. (citations omitted). Gerep was therefore justified in terminating the contract.

There could hardly be a more indisputable, universally applicable (at least in Tennessee) and clear rule of law than that, when one party to a contract breaches the terms of the contract, the contract ends. The only thing left, thereafter, is for the parties to the contract to either disengage their affairs and any property theretofore encumbered by the contract or for the parties to make a new decision to continue the relationship created by the contract, which, even if continued precisely as it had been before the termination, in effect, is a new contract made just like the one which was in force previous to termination. *Cummins v. McCoy,*

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22 Tenn.App. 681, 691, 125 S.W.2d 509 (1938); *Santa Barbara Capital Corp. v. World Christian Radio Foundation, Inc.*, 491 S.W.2d 852, 857 (Tenn.App. 1972), *cert denied* March 19, 1973; *W.F. Holt Company v. A & E Electric Company, Inc.*, 665 S.W.2d 772, 730 (Tenn.App. 1983) perm. app. den. January 30, 1984; *Misco, Inc. v. United States Steel Corporation*, 784 F.2d 198, 202 n.2 (6th Cir. 1986); *Mr. Transmission, Div. of International Transtech Corporation v. Yount*, 13 TAM 29-14, 1988 Tenn.App.LEXIS 297 (Tenn.App. May 27, 1988); *Almany v. Nationwide Insurance Co.*, 12 TAM 10-6 (Tenn.App. M.S. January 29, 1987); 17 *AmJur2d* Contracts § 365 p. 807 and 17 *AmJur2d Supp.* pp. 222-223; *Restatement (Second) Contracts* § 237, § 241 (1979). The result reached in *Memphis-Friday's* and *Pizza Pumps* is nothing more than an undazzled application of a rule which is beyond dispute either on the oughtness or the existence level.

There are contracts with specific terms which, when the first breach rule is applied to them, yield a different result than when the same rule is applied to contracts without such provisions. That is, if a contract has as a part of it stated means by which the parties must terminate the contract, the explicit prerequisites of the contract will displace the common law rule which, as a matter of law, terminates the contract upon first breach. For instance, if a contract has a cure provision which requires a stated amount of advanced notice to provide an opportunity for the breaching party to cure the breach, the breach by the breaching party will not terminate the contract. Instead, the contract can be terminated only by the means explicitly set out in the contract. In such contracts, the breach by one party normally effectuates the termination provision and gives opportunity for the non-breaching party to set in motion the termination process; however, the termination itself cannot occur by a mere breach. But, the fact

that the first breach rule has an effect on contracts with provisions setting out the means of termination different from its effect on contracts with such provisions does not lessen the force of the first breach rule when applied to contracts without such explicit terms. *Micro Craft, Inc. v. Jones-Robertson, Inc.*, 10 TAM 14-8 (Tenn.App., W.S. Sitting at Nashville, March 6, 1985).

The Lease has no explicit provisions governing its termination. There is no advance notice requirement nor is there any other opportunity provided for either party to cure a breach. Therefore, termination is effectuated by the explicit common law governing termination of contracts where no explicit contract provision sets out the means by which termination must occur.

In the case of *In re Studebaker's of Fort Lauderdale Ltd.*, 73 B.R. 217 (Bankr. N.D.Fla. 1987), the court was faced with debtor's argument that it retained an equitable interest in a terminated commercial lease by virtue of its continued possession of the demised premises at the time of filing the petition for relief and that it would amount to an **unjust enrichment** to the landlord to prevent the debtor from assuming the lease post-petition. The words of the court are elucidating as follows in *In re Studebaker's of Fort Lauderdale Ltd., supra*, 73 B.R. at 218-220:

> The **debtor, . . ., asserts** that it has an equitable right to possession of the subject premises; that **due to the debtor's improvements of said property, the landlord will be unjustly enriched** if allowed to remain in possession; and that it is ready, willing, and able to tender the full amount owed on the rent arrearage, plus interest, costs, and attorney's fees to the landlord herein . . . . The landlord contests said motion, asserting that the

lease was validly terminated pursuant to state law prior to the debtor's filing . . . .

* * *

[m]any courts have ruled that such bare "hold over" possession by the tenant and/or inconclusive proceedings for repossession by the landlord gives the tenant a slight equitable interest which is property of the estate under § 541 and protected by the filing . . . .

* * *

Under § 365 of the Bankruptcy Code, the equitable considerations applied in the **Fontinbleau** [515 F.2d 913 (5th Cir. 1975)] have been **superseded by** specific statutory language addressing the assumption of leases. **§ 365(c)(3)** provides that: . . . . If the *lease* is thus terminated, as opposed to the tenant being dispossessed of the premises, then the trustee is precluded from assuming it. The presence of a slight equitable interest by virtue of possession of premises by a debtor has no bearing whatsoever on the issue of assumability of an unexpired lease. "Once a lease is terminated prior to the intervention of bankruptcy, the landlord-tenant relationship is gone regardless of the right of possession." (citation omitted).

* * *

Accordingly, the debtor had no interest in the lease

or the leasehold premises to be included as property of the estate under § 541 when this case was filed.

LEASE TERMINATION

As quoted on pages 3 and 4 of the Partnership's Motion, the Lease, unequivocally, conditions the right of the lessee to hold the demised premises on the explicitly stated condition that the lessee pay all real property taxes "*promptly when due.*" The Lease has no "ifs," "ands," "buts," or "ors" which in any way provides a caveat or exception with respect to whether or when real property taxes must be paid by the lessee in order for the lessee to preserve its right to hold the premises.

There could be no dispute with respect to the conditionality of the right of the lessee to hold the leased property or that failure to pay the real property taxes *when due* was a breach of the agreed-to condition which the lessee promised the Partnership it would perform at risk of forever losing its right to hold the demised premises.

The Lease has in it not one word which extends to the lessee any right to be notified by the Partnership that it has failed to keep its promise with respect to *promptly* paying the real property taxes *when due.* There are no words of any kind at any place in the Lease from which it could be implied that the Partnership ever undertook the obligation to provide notice to the lessee that, if it failed to keep its promise to pay the real property taxes, *promptly when due,* the Partnership would remind the lessee. Instead, the Partnership and the lessee, in very uncomplicated and abundantly clear language, agreed that the lessee would take full responsibility to pay the real property taxes when due, without prompting by the Partnership, and that the lessee would bear the

full consequences of its failure.

As stated on pages 4, 5 and 6 of the Partnership's Motion, the lessee, in the person of Debtor, allowed over $80,000 in real property taxes to accumulate, due but unpaid, from October 1, 1987 up through and including March 1, 1989.

By May 2, 1989, over $9,000 in interest, court costs and attorney's fees incurred by the taxing authorities in their efforts to collect the due, but unpaid, taxes had accrued and was continuing to accrue on a daily basis. The leased premises were threatened with and encumbered by tax liens because of Debtor's prolonged failure to abide by the condition which it promised to satisfy as an essential prerequisite of its right to possession of the leased premises.

There is no privity of contract between the Partnership and any persons or entities other than Colonial Enterprises, Inc. and its assignees or assignees of its assignees, the latest of which is Debtor. In other words, the Partnership looks to Debtor and to no other person nor entity for payment of the taxes as promised by Colonial Enterprises, Inc.

If persons or entities, in privity with Debtor, have breached agreements obligating such other persons to Debtor with respect to paying taxes, Debtor's remedy for losses suffered because of the termination of the lease is against those obligated to Debtor. None of this alters the fact that the Lease terminated upon failure of the lessee (Debtor) to live up to its promise to pay all real property taxes *promptly when due*. Since the first failure by the lessee (Debtor) to pay real property taxes promptly when due, on October 1, 1987, Debtor has been no more than, at best, a tenant at sufferance of the Partnership. The Partnership intends

to be at sufferance for no longer.

PARCEL 29.04

This section of this Memorandum relates specifically to what is addressed by the second "FOR FURTHER CAUSE" paragraph on page 2 of the Partnership's Motion which this memorandum supports. That is, a 5.71 acre portion of the 95.5 acres originally demised by the Lease (which is now Parcel 29.04 on Map 132) as to which there is (or at least was) a dispute between Debtor and the Partnership with respect to tenancy and occupancy. As stated in the Partnership's Motion, it is the Partnership's position that this 5.71 acres is part of the demised premises occupied and possessed by Debtor. It is (or was) the position of Debtor that this 5.71 acre Parcel 29.04 is not in Debtor's possession because it is not part of the premises demised by the Lease to Debtor. This is presently relevant to the Partnership's Motion because of the Partnership's request that Debtor be ordered to turnover the demised premises.

Debtor is (or at least was) apparently going to resist turnover of that 5.71 acre portion of the demised premises, if for no other reason, on the contention that Debtor did not possess the 5.71 acres to turnover. Dependent on the response of Debtor and other interested persons to the Partnership's Motion, the issue with respect to the 5.71 acres could become germane to an issue as yet not raised and, because this issue might be avoided altogether, it will not be broached here. But, if the issue is subsequently raised, reference back to what is discussed here, because of the turnover issue, will be made.

The Lease has specific language which operates to control whether Debtor possesses the 5.71 acres by virtue of the assignment

from Premiere Investment Properties, Inc. to Debtor of the Colonial leasehold. The language appears succinctly as follows in enumerated paragraph 1 on page 3 of the Lease:

> This lease may be assigned or the leased premises may be sublet in whole or in part . . . .

As noted above, the Lease has never been amended, explicitly or implicitly, at any time which in any way modifies or allows deviation from the obligations imposed on the Partnership's tenant/lessee by the above-quoted words. Furthermore, the Partnership has never ratified or otherwise consented to any tenant/lessee's deviation from the obligations undertaken by the tenant/lessee as a result of the above-quoted words.

From the Partnership's standpoint, the above-quoted words ensure a vitally important arrangement by which the Partnership intended to be related to the demised property. More specifically, the Partnership never intended to have but one tenant/lessee responsible to the Partnership and to whom/which the Partnership could look for performance of all of the terms of the Lease. If the tenant/lessee of the Partnership chose to have one or a hundred and one subtenants, this was a decision left by the Partnership to the Partnership's tenant/lessee; however, no matter what decision the Partnership's tenant/lessee made with respect to subleasing the demised premises, this would in no way impact the fact that the Partnership would continue to have one responsible party, i.e., the Partnership's tenant/lessee.

The above-quoted language from the Lease allows that Partnership's tenant/lessee flexibility to remove itself from the relationship with the Partnership by replacing itself with ***an*** assignee. However, the Partnership's tenant/lessee could never

replace itself with multiple assignees. This would defeat the entire premise of the Lease by forcing the Partnership into direct relationships with more than one tenant/lessee. The Partnership protected itself from such a situation by the explicit above-quoted language in the Lease. **What is assignable is: "This lease."** What may be "sublet in whole or in part" is the "leased premises." However, "this lease" cannot be assigned "in whole or in part."

Attached to this memorandum as Exhibit A is a copy of a document entitled "ASSIGNMENT OF LEASE" entered into, according to what is said on its face, on February 1, 1984 and which is recorded as Instrument No. 293425 in Book 2094 on pages 077 and 078 which purports to transfer the subject 5.71 acres. It is the position of the Partnership that this document, at best, is a sublease from Colonial to Orange Tee, Inc.

The context is worthy of note. In February 1984, Colonial, since the inception of the Lease on December 11, 1974, had been the one and only tenant/lessee of the Partnership. There had been one, and only one, prior amendment (which is the only amendment there ever has been) to the Lease, and it occurred on April 1, 1977 and gave to Colonial 55 years of extended options and transferred from Colonial its leasehold on 1.65 acres of the 95.5 acres of demised premises.

The attached (Exhibit A hereto) "ASSIGNMENT OF LEASES" is signed by Orvis Milner for and as President of Colonial and by Orvis Milner for and as President of Orange Tee, Inc. The Partnership is not a party to the "ASSIGNMENT OF LEASE" nor has the Partnership affixed any seal or signature to it acknowledging or consenting thereto.

The language of the "ASSIGNMENT OF LEASE" is worthy

of direct quote as follows:

> Whereas, the Assignor (Colonial) is legally in the possession of certain property (further description of the 5.71 acres omitted) . . . which has been **sublet to Omie, Inc.**, under agreement dated August 7, 1978 (further description omitted) . . ., and
>
> Whereas, for good and valuable consideration, . . .paid by Assignee (Orange Tee Inc.) to Assignor (Colonial), the **following described property is hereby assigned from Colonial . . . to the Orange Tee, Inc.** who shall hereinafter stand in the stead and place of Assignor (Colonial) and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement.

Omie, Inc. is not a party to the "ASSIGNMENT OF LEASE" and has not signified any agreement or acquiescence to the document nor its contents. Likewise, Omie, Inc. has never raised any objection; therefore, presumably satisfactory arrangements were made between Omie, Inc. and Orange Tee, Inc. and Colonial.

What Orange Tee, Inc. assumed (i.e., "the following described property") is the sublease from Colonial to Omie, Inc. and that sublease, with its modification, appears in the Knox County, Tennessee Register's Office Book 1840 Page 799 and Book 2071 Page 180. Exhibit A hereto was/is an assignment of a sublease explicitly identified. When the "ASSIGNMENT OF LEASE" (Exhibit A hereto) states that it assigned to Orange Tee, Inc. "the

following described property," it obviously did not convey the 5.71 acres because it did not own the 5.71 acres to convey. The most which Colonial could have assigned is a leasehold right to the 5.71 acres. The leasehold, however, is no broader than the Lease from which it derives. From the language above quoted, it is clear that the Lease limited the leasehold rights of Colonial allowed it to assign the entire Lease and, if Colonial wished to do anything with less than the entire Lease, it could sublet and sublet only.

No person has ever surfaced presenting itself/himself as a tenant/lessee of the 5.71 acres. Had such been the case, the Partnership would have refused to recognize any such purported rights. However, the problem has never presented itself because neither Orange Tee, Inc. nor any other persons has ever represented to the Partnership that it/he was a tenant/lessee of the Partnership. Further, the Partnership has never received any rent from Orange Tee, Inc. for any portion of the demised property.

If Colonial purported to assign to Premiere Investment Properties, Inc. anything less than the entirety of the leasehold represented by the Lease, the assignment was, and remains, a nullity. It is immaterial what the intent of Colonial was and what the intent of Premiere Investment Properties, Inc. was. Again, all Colonial could transfer was its leasehold, and, again, its leasehold is nothing more than what is described by way of rights and obligations in the Lease. Therefore, Colonial either assigned to Premiere Investment Properties, Inc. the entire leasehold evidenced by the Lease covering the entirety of 93.85 acres of demised premises or transferred to Colonial nothing.

The Partnership was not a party, an acquiescer nor a ratifier of the assignment (or now perhaps purported assignment) from

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Colonial to Premiere Investment Properties, Inc., and, consequently, the Partnership is not knowledgeable with respect to the terms of any document evidencing that transaction. The same is true with respect to the assignment (or now, perhaps, purported assignment) of Premiere Investment Properties, Inc. to Pioneer Investment Services Company. The Lease does not require the Partnership's tenant/lessee to secure prior consent or permission of the Partnership in order to assign. The Partnership has presumed the regularity of the assignments and, therefore, presumed that the assignments have been made in accordance with the provisions of the Lease.

If Premiere Investment Properties, Inc. or Pioneer Investment Services Company chose to agree with Colonial, as part of the terms of the assignment from Colonial, to leave in place the sublease to Orange Tee, Inc. evidenced by Exhibit A hereto, this certainly is a permissible bargaining point between Colonial and its assignees and of no interest to the Partnership. If, because of such an agreement between Colonial and its assignees, Debtor and Debtor's predecessor, Premiere Investment Properties, Inc., did not consider themselves to "have" the 5.71 acres because they had placed it beyond their ability to use it and had agreed not to disturb the possession of the subtenants then in possession of the property, this in no way diminished the size of the demised premises by 5.71 acres nor did it relieve Debtor or Premiere Investment Properties, Inc. of its responsibilities to the Partnership with respect to the use of the property and payment of real property taxes on it.

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Respectfully Submitted,

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s/ Larry E. Parrish
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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish

APPENDIX C — RELEVANT STATUTES

28 U.S.C. § 151

§ 151. Designation of bankruptcy courts.

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

28 U.S.C. § 152

§ 152. Appointment of bankruptcy judges.

(a)(1) The United States court of appeals for the circuit shall appoint bankruptcy judges for the judicial districts established in paragraph (2) in such numbers as are established in such paragraph. Such appointments shall be made after considering the recommendations of the Judicial Conference submitted pursuant to subsection (b). Each bankruptcy judge shall be appointed for a term of fourteen years, subject to the provisions of subsection (e). However, upon the expiration of the term, a bankruptcy judge may, with the approval of the judicial council of the circuit, continue to perform the duties of the office until the earlier of the date which is 180 days after the expiration of the term or the date of the

appointment of a successor. Bankruptcy judges shall serve as judicial officers of the United States district court established under Article III of the Constitution.

(2) The bankruptcy judges appointed pursuant to this section shall be appointed for the several judicial districts as follows:

DISTRICTS	Judges
Alabama:	
Northern	5
Middle	2
Southern	2
Alaska	2
Arizona	5
Arkansas:	
Eastern and Western	3
California:	
Northern	9
Eastern	6
Central	19
Southern	4
Colorado	5
Connecticut	2
Delaware	1
District of Columbia	1
Florida:	
Northern	1
Middle	4
Southern	3

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Georgia:
- Northern 6
- Middle 2
- Southern 2

Hawaii 1
Idaho 2
Illinois:
- Northern 10
- Central 3
- Southern 1

Indiana:
- Northern 3
- Southern 4

Iowa:
- Northern 2
- Southern 2

Kansas 4
Kentucky:
- Eastern 2
- Western 3

Louisiana:
- Eastern 2
- Middle 1
- Western 3

Maine 2
Maryland 3
Massachusetts 4
Michigan:
- Eastern 4
- Western 3

Minnesota 4

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Mississippi:
- Northern 1
- Southern 2

Missouri:
- Eastern 3
- Western 3

Montana 1
Nebraska 2
Nevada 3
New Hampshire 1
New Jersey 7
New Mexico 2
New York:
- Northern 2
- Southern 7
- Eastern 6
- Western 3

North Carolina:
- Eastern 2
- Middle 2
- Western 2

North Dakota 1
Ohio:
- Northern 8
- Southern 7

Oklahoma:
- Northern 2
- Eastern 1
- Western 3

Oregon 5

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Pennsylvania:
- Eastern 3
- Middle 2
- Western 4

Puerto Rico 2
Rhode Island 1
South Carolina 2
South Dakota 2
Tennessee:
- Eastern 3
- Middle 2
- Western 3

Texas:
- Northern 5
- Eastern 2
- Southern 6
- Western 4

Utah 3
Vermont 1
Virginia:
- Eastern 4
- Western 3

Washington:
- Eastern 2
- Western 5

West Virginia:
- Northern 1
- Southern 1

Wisconsin:
- Eastern 4
- Western 2

Wyoming 1

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(3) Whenever a majority of the judges of any court of appeals cannot agree upon the appointment of a bankruptcy judge, the chief judge of such court shall make such appointment.

(4) The judges of the district courts for the territories shall serve as the bankruptcy judges for such courts. The United States court of appeals for the circuit within which such a territorial district court is located may appoint bankruptcy judges under this chapter for such district if authorized to do so by the Congress of the United States under this section.

(b)(1) The Judicial Conference of the United States shall, from time to time, and after considering the recommendations submitted by the Director of the Administrative Office of the United States Courts after such Director has consulted with the judicial council of the circuit involved, determined the official duty stations of bankruptcy judges and places of holding court.

(2) The Judicial Conference shall, from time to time, submit recommendations to the Congress regarding the number of bankruptcy judges needed and the districts in which such judges are needed.

(c) Each bankruptcy judge may hold court at such places within the judicial district, in addition to the official duty station of such judge, as the business of the court may require.

(d) With the approval of the Judicial Conference and of each of the judicial councils involved, a bankruptcy judge may be designated to serve in any district adjacent to or near the district for which such bankruptcy judge was appointed.

(e) A bankruptcy judge may be removed during the term for which such bankruptcy judge is appointed, only for incompetence, misconduct, neglect of duty, or physical or mental disability and only by the judicial council of the circuit in which the judge's official duty station is located. Removal may not occur unless a majority of all of the judges of such council concur in the order of removal. Before any order of removal may be entered, a full specification of charges shall be furnished to such bankruptcy judge who shall be accorded an opportunity to be heard on such charges.

28 U.S.C. § 158

§ 158. Appeals.

(a) The district court of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decreees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district

court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial councils of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner

as appeals in civil proceedings generally are taken to the court of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

11 U.S.C. § 362

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of this case

under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceedings before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 USC 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title, or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity

contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 101(34)[sic(38)], 741(5) or 761(15) of this title, or settlement payment, as defined in section 101(35)[sic(39)] or 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which

the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument.

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of a final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App USC 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred

ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App USC 1117 and 1271 et seq., respectively), or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App USC 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App USC 1117 and 1271 et seq., respectively); or

(14) under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash,

securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement.

(15) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an education institution; or

(17) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 (20 USC 1001 et seq.) or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act.

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the

stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 365

§ 365. Executory contracts and unexpired leases.

(a) Except as provided in section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to —

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(3) For the purposes of paragraph (1) of this section and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance—

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental to such lease before assumption of such lease unless the

lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegations of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory

contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

Appendix C

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on—

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

Appendix C

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed

under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title—

(A) if before such rejection the case has not been converted under section 1112, 1307, or 1208 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1307, or 1208 of this title—

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease or timeshare plan as terminated by virtue of its own terms,

applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (1) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract

as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchasedr remains in possession—

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused bvy the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subseciton (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

Appendix C

(k) Assignment by the trustee to an entity of a contract or lease asumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect—

(A) to treat such contract as terminated by such rejectin if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for—

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under app;licable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract—

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive—

(i) any right of set off it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall—

(A) to the extent provided in such contract or any agreement supplementary to such contract—

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract,, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Director of the Office of Thrift Supervision, the Comptroller of the Currency, or the Board of Govenors of the Federal Reserve System, or its predicessors or successors, to maintain the capital of an insured depository institution, and nay claim for a subsequent breach of the obligations thereunder

shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

OPPOSITION

BRIEF

(3)

No. 91-1625

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

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APPENDIX

Appendix A — Petitioner's Memorandum in Support of Motion to Lift Stay Filed May 25, 1989 ..... 1a

No. 91-1625

In The

Supreme Court of the United States

October Term, 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

STATEMENT OF THE CASE

A. Facts.

On April 12, 1989 (the "Filing Date"), Pioneer filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code. In its schedule of assets, Pioneer listed its interest in an unexpired lease of nonresidential real property under which Pioneer is the lessee and the Cain Partnership is the lessor (the "Lease").

Pioneer acquired its interest in the Lease from the original lessee pursuant to an assignment agreement dated April 13, 1987. Pioneer developed the Towne & Country Shopping Center and the Commons at Towne & Country on a portion of the leased premises (the "Leased Premises"). Pioneer's interest in the Leased Premises has a value of approximately $27,000,000. On May 18, 1989 Pioneer filed, pursuant to Section 365 of the Bankruptcy Code ("§ 365"), a motion to assume the Lease (the "Assumption Motion"). Pioneer filed the Assumption Motion to protect its interest in the Leased Premises and to prevent Cain Partnership from realizing a "windfall" by virtue of Pioneer's bankruptcy.

On May 24, 1989, Cain Partnership filed an objection to the Assumption Motion and a motion for relief from the automatic stay (the "Stay Motion") so that it could repossess the Leased Premises. Cain Partnership alleged that the Lease had automatically terminated prior to the Filing Date since Pioneer failed to pay certain taxes due under the Lease. Notwithstanding the fact it took no action prepetition to terminate the Lease, and the Lease has no termination clause, Cain Partnership alleged in its Stay Motion that this default automatically terminated the Lease and entitled Cain Partnership to repossess the Leased Premises.

The bankruptcy court, in addressing the Assumption Motion and the contentions of Cain Partnership, found that (1) the Lease

had not terminated prior to the Filing Date; and (2) Pioneer satisfied the requirements of § 365 for assumption of the Lease. The district court affirmed the decision of the bankruptcy court. In particular, the district court stated, "Judge Stair therefore ruled correctly that [Pioneer's] leasehold had not been terminated on or before the date of [Pioneer's] filing of its petition for relief, because of the lack of any affirmative action on the part of the [Cain] Partnership to terminate it." (Petition, App. D, 40a).

Cain Partnership appealed these decisions to the Sixth Circuit. While that appeal was pending, Cain Partnership, for the first time, raised jurisdictional issues by filing a motion pursuant to Federal Rule of Civil Procedure 60(b)(4) (the "60(b)(4) Motion") on October 9, 1990. This 60(b)(4) Motion sought to vacate the orders of the district court and bankruptcy court approving Pioneer's assumption of the Lease.

Thus, prior to October 9, 1990, Cain Partnership, at no time, challenged the jurisdiction of the bankruptcy court or the district court. On the contrary, Cain Partnership's own Memorandum of Law in support of its Stay Motion stated, "It is the contention of the [Cain] Partnership that the [Bankruptcy] [C]ourt has sufficient jurisdiction over [Pioneer] to require the turnover [of the Leased Premises] and that exercise of that jurisdiction is appropriate under the circumstances." (App. A).

The bankruptcy court denied Cain Partnership's 60(b)(4) Motion and found that the Assumption Motion and Stay Motion were core proceedings over which it had jurisdiction. In particular, the bankruptcy court stated, "The Bankruptcy Court undisputedly has jurisdiction to determine what is property of the estate." (Petition, App. I, 61a). The district court affirmed the ruling of the bankruptcy court that Cain Partnership's 60(b)(4) Motion was groundless.

On appeal, the Sixth Circuit affirmed the district court both as to its decision granting the Assumption Motion and denying Cain Partnership's 60(b)(4) Motion.

B. Cain Partnership's Misstatements of Fact and Law.

Cain Partnership makes several misstatements of fact and law in its petition to this Court. Among the most egregious misstatements of fact is its assertion that, "From the moment Pioneer scheduled an interest in the Property, Cain overtly challenged the basis for jurisdiction over Pioneer's claim. . . ." (Petition, 6). The truth is that, not only did it not challenge the jurisdiction of the bankruptcy court, Cain Partnership expressly consented to bankruptcy court jurisdiction.[1]

Pioneer filed the Assumption Motion on May 18, 1989. It was not until the bankruptcy court and district court ruled adversely to Cain Partnership (and while its appeal was pending before the Sixth Circuit) that Cain Partnership challenged the jurisdiction of the bankruptcy court, and the district court. Thus, a period of almost 17 months passed before Cain Partnershp raised any jurisdictional issues whatsoever.

Cain Partnership also speciously asserts that it "was not given an opportunity by the bankruptcy judge to express a position with respect to whether the proceeding was 'core' or 'non-core', or

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1. Cain Partnership's Stay Motion expressly recognized the jurisdiction of the bankruptcy court. Specifically, its Memorandum of Law in support of the Stay Motion stated, "It is the contention of the Partnership that the court has sufficient jurisdiction over the Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances." (App. A). Thus, contrary to Cain Partnership's assertions, the Stay Motion was not "a frontal assault on the court's jurisdiction." (Petition, 6). Rather, the Stay Motion was a frontal assault on Pioneer's Assumption Motion which, like the Stay Motion, was a core proceeding. 28 U.S.C. § 157(b)(2)(G) and (M).

with respect to consent." (Petition, 7). This assertion is misleading for two reasons. First, it implies that Cain Partnership overtly contested the jurisdiction of the bankruptcy court, and that the bankruptcy court disregarded Cain Partnership's contentions. As the record shows, Cain Partnership never contested the jurisdiction of the bankruptcy court until October 9, 1990, which was more than 17 months after Pioneer filed the Assumption Motion. Second, this contention erroneously suggests that a party is powerless to contest the jurisdiction of a bankruptcy court.

The statutes delineating bankruptcy court jurisdiction provide a panoply of protections for a party wishing to contest bankruptcy court jurisdiction. In particular, Cain Partnership could have brought a motion pursuant to 28 U.S.C. § 157(b)(3) ("§ 157(b)(3)") for a determination of the status of this proceeding before the bankruptcy court. Further, Cain Partnership could have filed a motion with the district court for the withdrawal of the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d). Finally, Cain Partnership could have brought an abstention motion pursuant to 28 U.S.C. § 1334(c)(1).

It is incumbent upon a party to exercise these statutory rights. Cain Partnership chose not to pursue these avenues and impliedly waived its right to contest bankruptcy court jurisdiction. Further, as its Memorandum of Law in support of its Stay Motion reveals, Cain Partnership expressly agreed that the bankruptcy court was the appropriate forum to resolve the matters at hand. Thus, Cain Partnership has not been "the victim of a classic jurisdiction by ambush" (Petition, 27); rather, Cain Partnership is a victim of its own consent and neglect in failing to pursue its available alternatives to challenge the jurisdiction of the bankruptcy court.

Cain Partnership's "Statement of Facts" is also misleading because it virtually ignores the origin of this case which is Pioneer's

Assumption Motion, not Cain Partnership's Stay Motion.[2] In particular, Cain Partnership states that, "This litigation began with a lease dispute between Cain and Pioneer Investment Services Company, the debtor-in-possession ('Pioneer'), which erupted in Bankruptcy Court when Pioneer listed an interest in Cain's property. . . ." (Petition, 4). This introductory sentence is misleading for two reasons. First, there was no dispute between Pioneer and Cain Partnership prior to the Filing Date. As the record reveals, Cain Partnerhsip made no attempt, prior to the Filing Date, to either terminate the Lease or to compel Pioneer to pay the past due taxes. Second, this statement implies that Pioneer did not properly list its interest in the Lease in its schedules of assets.[3]

Contrary to Cain Partnership's assertion, Pioneer had a legitimate reason for listing the Lease on its schedules of assets. Pioneer built a $27,000,000 shopping center on the Leased Premises. This fact, coupled with the failure of Cain Partnership to even notify Pioneer of an alleged default under the Lease, clearly shows that Pioneer not only had a legitimate reason to list the Lease on its schedules of assets, but also, to assume it.

The petition of Cain Partnership also contains numerous misstatements of law. Cain Partnership's contentions, that there is a conflict among the circuits concerning implied consent of

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2. It was Pioneer's Assumption Motion, not Cain Partnership's Stay Motion, which precipitated the proceeding now before this Court. Resolution of the Assumption Motion was not necessarily dependent upon resolution of the Stay Motion. (Petition, 6 fn. 7).

3. Cain Partnership makes the disingenuous argument that, "[U]pon the mere listing by the debtor of an interest in any property, whether Cain's real estate, the Taj Mahal or one of the Justices' leather chairs, federal jurisdiction automatically attaches . . . ." (Petition, 20). Pioneer's interest in the Leased Premises was not hypothetical; rather, Pioneer was in possession of the Leased Premises on the Filing Date.

a party pursuant to 28 U.S.C. § 157(c)(2) ("§ 157(c)(2)"), and that this "conflict" merits Supreme Court review, are misleading for two reasons. First, this case arises from a contested matter — not an adversary proceeding. Contested matters are governed by Rule 9014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") which omits any reference to the Bankruptcy Rules governing consent in adversary proceedings. Thus, the alleged split among the circuits, which arises from these rules, is totally inapposite to the case before this Court. Second, contested matters are core proceedings by their very nature. Contested matters invoke substantive rights provided solely by title 11 and can arise only in the context of a bankruptcy case. Pioneer's Assumption Motion clearly invokes a right provided solely by title 11 and therefore is a core proceeding. The fact that the Assumption Motion is a core proceeding obviates any need for this Court to examine the issue of consent.

Cain Partnership's second misstatement of law is that there is no federal jurisdiction under 28 U.S.C. § 1334(d) if Pioneer had no interest in the Lease. This assertion is incorrect since, even if the Lease had terminated prepetition (which it did not), Pioneer still retained possession of and had a naked possessory interest in the Leased Premises. This equitable interest was sufficient to confer jurisdiction upon the bankruptcy court.

SUMMARY OF ARGUMENT

This case does not raise any Article III concerns which this Court must address because (1) the decision of the lower courts are consistent with the opinions of this Court; (2) Pioneer's Assumption Motion is a core proceeding; and (3) bankruptcy courts have subject matter jurisdiction regardless of whether a proceeding is core or noncore. Since the assumption is a core proceeding, the issue of consent is irrelevant. Further, even if this proceeding was considered noncore, Cain Partnership expressly

consented to the jurisdiction of the bankruptcy court. Finally, Cain Partnership's petition is ill-suited to resolve the apparent conflict among the circuits because the case before this Court arises in the context of a contested matter — not an adversary proceeding.

REASONS FOR DENYING THE WRIT

I.

CONTRARY TO CAIN PARTNERSHIP'S ASSERTIONS, THIS CASE DOES NOT RAISE ANY ARTICLE III CONCERNS WHICH THIS COURT MUST ADDRESS.

A. The Decisions Of The Lower Courts Are Not In Conflict With The Decisions Of This Court.

This case raises no structural Article III concerns due to the unique nature of bankruptcy rights. "The right of a bankrupt or a debtor to have his affairs would up in a court of bankruptcy is a federal right explicitly recognized by the Constitution. . . as well as by Congress." *In re Skinner*, 917 F.2d 444, 449 (10th Cir. 1990) quoting, *In re Walters*, 868 F.2d 665, 670 (6th Cir. 1989). The power of Congress to promulgate legislation regarding bankruptcy subsumes the power to provide for the determination of those rights. *Crowell v. Benson*, 285 U.S. 22, 85 (1931) (Brandeis, J., dissenting). Since the power to assume a lease arises solely from Congress' Article I bankruptcy authority, Congress may provide for the determination of this right. Thus, "[t]here is no reason inherent in the separation of power principles to accord the state law character of a claim talismanic power in Article III inquiries." *Commodity Futures Trading Commission v. Schor ("Schor")*, 478 U.S. 833, 853 (1986).

Contrary to Cain Partnership's protestations, the fact that

non-Article III courts decide contested matters is of no moment. This Court has held that Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, may create a seemingly private right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary. *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-94 (1985). The Bankruptcy Code, and § 365 in particular, is exactly the type of integrated regulatory scheme which allows bankruptcy courts to resolve state law issues which merely are tangential to bankruptcy rights.

Cain Partnership conveniently omits that bankruptcy courts are not independent of the district courts; they are subordinate adjuncts of the Article III district courts. 28 U.S.C. § 151; *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 608 (C.D. Cal. 1984). Thus, bankruptcy courts are continually under the aegis of Article III governance and there are no structural Article III concerns raised by the case before this Court. *United States v. Raddatz*, 447 U.S. 667 (1980). In the absence of any such concerns it is clear that Cain Partnership not only could, but did, waive its right to Article III court determination of its tangential state law claim. *Schor, supra*; *Crowell v. Benson, supra*.

The decisions of this Court clearly establish that Article III does not confer on litigants an absolute right to the plenary consideration of every nature of their claim by an Article III court. *Schor, supra*, at 848; *Thomas v. Union Carbide Agricultural Products Co., supra*; *Crowell v. Benson, supra*. Moreover, the decisions of this Court hold that, as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights that dictate the procedures by which civil and criminal matters must be tried. *Schor, supra*, at 848-49. Since bankruptcy court resolution of Cain Partnership's tangential state law claim does

not in any way emasculate Article III courts, Cain Partnership clearly waived whatever personal right it may have had to Article III adjudication of this claim. *Schor, supra*, at 850.

B. The Distinction Between Public And Private Rights Is Irrelevant To The Constitutional Concerns Raised By Cain Partnership.

Attempting to further obfuscate the issue, Cain Partnership raises the issue of whether the restructuring of debtor/creditor relationships is in fact a public right capable of non-Article III court adjudication. (Petition, 18 citing *Granfinanciera, S.A. v. Nordberg* ("*Granfinanciera*"), 492 U.S. 33, 56 fn. 11 (1989).) The murky distinctions between public and private rights add nothing to resolving the alleged constitutional concerns raised by Cain Partnership.

First, the distinction between public rights and private rights has never been definitively explained by this Court.[4] *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* ("*Marathon*"), 458 U.S. 50, 69 (1982). Second, "[t]his Court has rejected any attempt to make determinative for Article III purposes the distinction between public and private rights." *Schor, supra*, at 853. Accordingly, the public/private rights distinction is not determinative of bankruptcy court jurisdiction. Rather, bankruptcy court jurisdiction arises from the fact that Congress, acting pursuant to its valid Article I legislative purposes, may create rights which can be delegated to non-Article III courts.

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4. *Marathon* never held that restructuring debtor/creditor relationships is a public right. Thus, it is difficult to see why the footnote in *Granfinanciera* cited by Cain Partnership requires this Court to examine yet again the Gordian Knot of public versus private rights.

1. Contested matters are always core proceedings since they involve rights created by Congress pursuant to its Article I bankruptcy powers.

The Bankruptcy Amendment and Federal Judgeship Act of 1984 ("BAFJA") does not provide an exclusive list of what constitutes core proceedings nor does it provide a definition of noncore proceedings. The definition of the distinction was left to case law which emerged subsequent to BAFJA. Not surprisingly, attempting to draw distinctions between core and noncore proceedings is a "Sisyphean task." *See, In re United Security & Communications, Inc.*, 93 B.R. 945, 954 (Bankr. S.D. Ohio 1988). The problem in making such distinctions is that a "bankruptcy judge is constantly enmeshed in state law issues." *Marathon*, 458 U.S. 50, 97 (1982) (White, J., dissenting).

The court in *Matter of Wood*, 825 F.2d 90 (5th Cir. 1987), provided a clear definition of a core proceeding. In *Matter of Wood*, the Fifth Circuit held, "[A] proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." *Id.* at 97.

Pioneer's Assumption Motion clearly invoked a substantive right provided solely by title 11. It is only by virtue of § 365 that a debtor may cure defaults under a lease and assume it. Accordingly, it is beyond cavil that a motion to assume a lease is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) ("§ 157(b)(2)"). *See, Harley Hotels, Inc. v. Rain's Intern., Ltd.*,57 B.R. 773 (M.D. Pa. 1985); *In re Windmill Farms Management Co.*, 116 B.R. 755 (Bankr. S.D. Cal. 1990); *In re New York Deli, Ltd.*, 75 B.R. 797 (Bankr. D. Hawaii 1987); *In re Acolyte Electric Corp. v. City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986); *In re Nexus Communications, Inc.*, 55 B.R. 596 (Bankr. E.D.N.C. 1985); *Matter of Republic Oil Corp.*, 51 B.R. 355 (Bankr. W.D.

Wis. 1985); *In re Turbowind, Inc.*, 42 B.R. 579 (Bankr. S.D. Cal. 1984).

In fact, the statutory framework Congress created with the Bankruptcy Code reveals that all contested matters are core proceedings. Bankruptcy Rules 1017(d), 3020(b)(1), 4001(a), 4003(d), and 6006(a) make explicit the types of motions to which Bankruptcy Rule 9014 applies. These rules govern respectively the dismissal or conversion of a case, objections to confirmation of a plan, relief from the automatic stay and the use of cash collateral, avoidance of a lien under § 522(f) of the Bankruptcy Code, and the assumption or rejection of executory contracts or unexpired leases. 9 *Collier on Bankruptcy*, ¶ 9014.01, p. 9014-1, 2 (15th ed. 1992). All of these proceedings clearly involve substantive rights provided solely by title 11. As a result, contested matters are core proceedings by their very nature. 28 U.S.C. § 157(b).

By enacting the Bankruptcy Code, Congress created a closely integrated regulatory scheme for restructuring debtor/creditor relations. In particular, § 365 was designed to resolve lease disputes quickly. The speed with which a debtor can make decisions to assume or reject unexpired leases of nonresidential property has a profound impact on the value of these leases to the bankruptcy estate. Accordingly, it is not surprising that lease assumption motions are conducted in the context of a contested matter and not an adversary proceeding. "The formal procedural approach for adversary proceedings set out in Part VII is, taken as a whole, inappropriate to decide contested matters where the issues may be relatively simple or where expedition is necessary." 9 *Collier on Bankruptcy*, ¶ 9014.05, p. 9014-5 (15th ed. 1992). Thus, the burdens of the formal procedures of adversary proceedings are inappropriate for contested matters.

2. The tangential state law concerns raised by Cain Partnership are irrelevant to the determination of the core/noncore status of this case.

Although Cain Partnership attaches great significance to the tangential state law issues which underlie its objection to Pioneer's Assumption Motion, these concerns are irrelevant to the determination of the core status of Pioneer's Assumption Motion. Congress recognized that state law permeates the bankruptcy process. Accordingly, § 157(b)(3) provides:

> *A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.*

28 U.S.C. § 157(b)(3). (Emphasis supplied).

As the plain language of § 157(b)(3) (and the holding of *Matter of Wood)* reveals, Pioneer's Assumption Motion is a core proceeding. First, a motion to assume an unexpired lease of nonresidential real property invokes a substantive right provided solely by title 11. Second, the plain language of § 157(b)(3) provides that the determination of noncore status shall not be made solely on the basis of state law. "The source of the cause of action, not the governing substantive law, is to be determinative." 1 *Collier on Bankruptcy,* ¶ 3.01, p. 3-53 (15th ed. 1992).

The flaw in Cain Partnership's argument is that it focuses exclusively on the governing substantive law and ignores completely the source of the cause of action (*i.e.,* Pioneer's Assumption Motion). The source of Pioneer's Assumption Motion is § 365 — a right that is created by and exists solely by virtue of federal law. Both the plain language of the statute and the case law show that no jurisdictional significance arises simply because the

resolution of Pioneer's Assumption Motion is affected, in part, by state law. *See, Harley Hotels, Inc. v. Rain's Intern., Ltd., supra,* at 781; *In re New York Deli, Ltd., supra,* at 801; *Matter of Republic Oil Corp., supra,* at 357-58.

Contrary to Cain Partnership's assertions, this case does not involve adjudication of state created private rights. Cain Partnership asserts incorrectly that if Pioneer's interest in the Lease was properly terminated prepetition, which it was not, there would be no federal jurisdiction under 28 U.S.C. § 1334(d) ("§ 1334(d)"). (Petition, 20). The plain language of § 1334(d) provides:

> The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all the property, wherever located, of the debtor as of the commencement of such case, *and of property of the estate.*

28 U.S.C. § 1334(d). (Emphasis supplied). Since property of the estate includes all legal or equitable interests of the debtor, even if the Lease had terminated prepetition, Pioneer still retained possession of and had a naked possessory interest in the Leased Premises as of the Filing Date. 11 U.S.C. § 541(a)(1); *In re Waterkist Corp.*, 775 F.2d 1089, 1092 (9th Cir. 1985).[5]

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5. Unlike Cain Partnership, which took no prepetition action whatsoever to terminate the Lease, the landlord in *In re Waterkist Corp.* took action sufficient to terminate the debtor's lease. Notwithstanding this termination, the Ninth Circuit found that the equities strongly favored the debtor since it would stand to lose over one million dollars in improvements to the leased premises as opposed to a default under the lease in the amount of $27,301.52.

C. Bankruptcy Courts Have Subject Matter Jurisdiction Regardless of Whether The Proceeding Is Core Or Noncore.

In a further attempt to create Article III concerns, Cain Partnership asserts that § 157(c)(2) violates Article III since the stipulation by the parties does not create subject matter jurisdiction. (Petition, 22). This argument is flawed for two reasons. First, § 157(c)(2) is inapposite since the case currently before the Court is a core proceeding. Second, and most importantly, Cain Partnership totally ignores the distinction between subject matter jurisdiction and core/noncore proceedings. Section 157(c)(2) does not violate Article III because a bankruptcy court has subject matter jurisdiction regardless of the core or noncore status of a proceeding. *See, In re General American Communications Corp.*, 130 B.R. 136, 154 (S.D.N.Y. 1991); *In re Wefco, Inc.*, 97 B.R. 749, 751 (E.D.N.Y. 1989); *In re Kelton Motors, Inc.*, 121 B.R. 166, 181 (Bankr. D.Vt. 1990); *In re Treadway*, 117 B.R. 76, 81 (Bankr. D.Vt. 1990). Thus, there are no structural Article III concerns raised by § 157(c)(2) because the parties are not conferring subject matter jurisdiction by their consent. The core/noncore distinction affects only the ability of the bankruptcy court to enter a final order. *In re General American Communications Corp., supra,* at 154.

Section 1334 and § 157 define the source of bankruptcy court jurisdiction. Pursuant to these sections, a bankruptcy court has subject matter jurisdiction over both core and noncore proceedings once the district court has referred cases and proceedings under title 11 to the bankruptcy judges for the district. 28 U.S.C. § 157(a). Cain Partnership's argument fails because the parties do not, by their consent, confer subject matter jurisdiction. Rather, Congress confers primary subject matter jurisdiction upon the district courts, which in turn have referred this jurisdiction to the bankruptcy courts. Since bankruptcy courts are subordinate adjuncts of the district courts, BAFJA does not create a situation

in which the parties, by consent, confer subject matter jurisdiction, which does not otherwise exist, upon a non-Article III court.

II.

THE SIXTH CIRCUIT'S FINDING THAT CAIN PARTNERSHIP CONSENTED TO THE JURISDICTION OF THE BANKRUPTCY COURT IS CORRECT.

A. Cain Partnership Waived Its Right To Contest The Core Nature Of This Proceeding.

Pioneer filed its Assumption Motion on May 18, 1989 and Cain Partnership filed its Stay Motion on May 25, 1989. It was not until October 9, 1990 that Cain Partnership raised for the first time the issue of whether the bankruptcy court had jurisdiction over these motions. Cain Partnership stood silent on the issue of jurisdiction for seventeen (17) months while it actively litigated Pioneer's Assumption Motion. In fact, these jurisdictional arguments arose only after the bankruptcy court and the district court ruled adversely to Cain Partnership. Thus, it is clear that Cain Partnership's contention, that the bankruptcy court lacked jurisdiction, is nothing more than an afterthought.

Contrary to its assertions, Cain Partnership never overtly challenged the jurisdiction of the bankruptcy court from the inception of these proceedings. (Petition, 6). Cain Partnership's assertion that it was never given the opportunity to "express a position with respect to whether the proceeding was core or non-core" is equally disingenuous. (Petition, 7). If Cain Partnership desired to express a position as to whether Pioneer's Assumption Motion was core or noncore it could, and should, have brought a motion pursuant to § 157(b)(3) for a determination as to the

status of the proceeding.[6] This, Cain Partnership did not do even though the plain language of § 157(b)(3) requires such a motion to be timely. As a result, Cain Partnership waived not only its right to require the bankruptcy court to make a core/noncore determination, but also, its right to contest jurisdiction once the bankruptcy court determined the matter was a core proceeding. *In re Johnson*, 1992 WL 57087, *3 (4th Cir. 1992); *In re Men's Sportswear, Inc., supra; In re Rath Packing Co.*, 75 B.R. 137, 138 (N.D. Iowa 1987), *aff'd*, 860 F.2d 1086 (8th Cir. 1988).

This Court has recognized that courts, by necessity, have jurisdiction to determine their own jurisdiction over the parties and subject matter by rendering a judgment. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which a plea of *res judicata* is made does not have the power to inquire again into that jurisdictional fact." *Id.* at 172. Thus, notwithstanding an erroneous conclusion about jurisdiction, a court's previous decision as to its jurisdiction will be *res judicata* as to any subsequent attack made on that court's jurisdictional determination — regardless of whether jurisdiction was actually contested. *Republic Supply Co. v. Shoaf*, 815 F.2d 1046 (5th Cir. 1987).

This Court has recognized that courts, by necessity, have jurisdiction to determine their own jurisdiction over the parties and subject matter by rendering a judgment. *Stoll v. Gottlieb*, 305 U.S. 165 (1938). "After a federal court has decided the question of jurisdiction over the parties as a contested issue, the court in which a plea of *res judicata* is made does not have the

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6. Likewise, Cain Partnership could have brought an absention motion pursuant to 28 U.S.C. § 1334(c)(1) or a motion for the district court to withdraw the reference to the bankruptcy court pursuant to 28 U.S.C. § 157(d) neither of which Cain Partnership pursued.

power to inquire again into that jurisdictional fact." *Id.* at 172. Thus, notwithstanding an erroneous conclusion about jurisdiction, a court's previous decision as to its jurisdiction will be *res judicata* as to any subsequent attack made on that court's jurisdictional determination — regardless of whether jurisdiction was actually contested. *Republic Supply Co., v. Shoaf,* 815 F.2d 1046 (5th Cir. 1987).

The jurisdictional determination of the bankruptcy court and the district court was not, however, erroneous. The contested matter giving rise to this petition clearly was a core proceeding. Cain Partnership knew the bankruptcy court considered Pioneer's Assumption Motion a core matter; however, it never objected to jurisdiction until it received an adverse ruling. As a result, Cain Partnership impliedly, if not expressly, consented to the bankruptcy court's entry of a dispositive order in this core matter. *In re Men's Sportswear, Inc., supra; Republic Supply Co. v. Shoaf, supra.*

B. Section 157(c)(2) Does Not Require Express Consent Of The Parties To The Jurisdiction Of A Bankruptcy Court.

The Cain Partnership has taken a passing comment of the Sixth Circuit, that this proceeding is perhaps noncore, and turned it into the Leviathan now before this Court. Cain Partnership construes this comment to mean that for its consent to be a valid waiver of its objection to bankruptcy court jurisdiction, the consent had to be express because only express consent is valid in adversary proceedings.

The fatal flaw of this argument is that § 157(c)(2) does not require the *express* consent of the parties. (Emphasis supplied). The relevant portion of this statute merely provides:

> [T]he district court, with the consent of all the

> parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge . . . .

Had Congress desired the express consent of the parties as a prerequisite to the exercise of bankruptcy court jurisdiction pursuant to § 157(c)(2), it certainly could have done so. Congress required the explicit consent of the parties for a magistrate to exercise jurisdiction pursuant to Section 636(c)(2) of the Magistrate's Act. Unlike the Magistrate's Act, the jurisdictional statute of the Bankruptcy Code does not require the explicit consent of the parties for a bankruptcy court to exercise noncore jurisdiction. Rather, explicit consent is required only in the Bankruptcy Rules; and there, only in adversary proceedings.

Because the Bankruptcy Rules require express consent only in adversary proceedings, several problems exist for Cain Partnership's argument. First, the case before this Court arises from a contested matter, not an adversary proceeding. Accordingly, the Bankruptcy Rules requiring express consent in adversary proceedings do not apply to this contested matter. Second, if the Bankruptcy Rules conflict with the bankruptcy statutes, the bankruptcy statutes take precedence over the Bankruptcy Rules. *In re Belmont Realty Corp.*, 112 B.R. 4, 5 (Bankr. D.R.I. 1990); *In re Roberts*, 68 B.R. 1004, 1005 (Bankr. E.D. Mich. 1987). To the extent a rule is inconsistent, the statute governs. 1978 *U.S. Code & Cong. Admin. News*, pp. 5787-6405.

III.

THERE IS NO CONFLICT AMONG THE CIRCUITS APPLICABLE TO THIS CASE.

A. The Apparent Conflict Among The Circuits As To The Necessity Of Express Consent To Bankruptcy Court Jurisdiction In Adversary Proceedings Is Not Relevant To Contested Matters.

The case before the Court arises from a contested matter not an adversary proceeding. Pioneer filed its motion to assume the Lease on May 18, 1989. Cain Partnership was served with notice of this motion. Cain Partnership, in turn, filed a motion on May 25, 1989 requesting that the bankruptcy court lift the automatic stay. No summons was issued for either motion. In short, the case now before the Court does not arise from an adversary proceeding.

Contested matters are governed by Bankruptcy Rule 9014 which provides:

> The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071.

Noticeably absent from the list of rules applicable to contested matters are Bankruptcy Rules 7008 and 7012. "[Rule 7012] is not mentioned in Rule 9014 and, therefore, is not expressly applicable to contested matters." 9 *Collier on Bankruptcy*, ¶ 7012.03, p. 7012-4 (15th ed. 1992).

The inapplicability of Bankruptcy Rules 7008 and 7012 to

contested matters is a crucial distinction which eliminates the need for this Court to resolve any alleged conflict among the circuits. The alleged conflict among the circuits arises directly from the plain language of Bankruptcy Rules 7008 and 7012.[7] As can be seen from the plain language of Bankruptcy Rules 7008 and 7012, and their omission from Bankruptcy Rule 9014, consent in a contested matter need not be express.

The cases Cain Partnership cites to support its proposition that there is a conflict among the circuits all involve adversary proceedings. *In re Brickell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991); *In re Davis*, 899 F.2d 1136 (11th Cir. 1990); *Home Insurance Co. v. Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989); *In re Men's Sportswear, Inc.*, 834 F.2d 1134 (2d Cir. 1987); *In re Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987). As a result, the alleged conflict between the decisions of the Seventh and Eleventh Circuits and those of the Second and Sixth Circuits involve procedural postures completely different from the current case before this Court.[8] Since this case involves a contested matter,

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7. Bankruptcy Rule 7008, in relevant part, provides:

> In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

Bankruptcy Rule 7012, in relevant part, provides:

> In non-core proceedings final orders and judgments shall not be entered on the bankruptcy judge's order except with the express consent of the parties.

8. Pioneer notes that the Ninth Circuit, like the Second and Sixth Circuits, (Cont'd)

it is ill-suited to resolve a conflict among the circuits involving the issue of implied consent in adversary proceedings.

B. The Apparent Conflict Among The Circuits Is A Result Of The Timing Of The Decisions.

The alleged conflict among the circuits is illusory. The apparent disparate positions of the circuits is explained easily by the timing of the decisions. The relevant language of Bankruptcy Rules 7008 and 7012, requiring express consent in adversary proceedings, was added by amendments to the Bankruptcy Rules which became effective August 1, 1987. The Seventh and Eleventh Circuits issued their decisions after the enactment and effective date of these amendments. The Sixth and Ninth Circuits rendered their decisions prior to the enactment of these amendments.

Although the Second Circuit rendered its opinion after August 1, 1987, the holding in *In re Men's Sportswear, Inc.* is distinguished by its unique procedural posture. While this decision ultimately involved an adversary proceeding, the debtor did not initiate the adversary proceeding until after the bankruptcy court approved the debtor's motion to assume certain licensing agreements.

The debtor, Men's Sportswear, Inc. ("Sportswear"), had entered into several licensing agreements with Sasson Jeans, Inc. ("Sasson") prepetition. Sportswear filed for Chapter 11 protection on October 14, 1983 and thereafter made a motion to assume these Sasson licensing agreements. Sasson vigorously opposed Sportswear's assumption motion and the assumption was not approved by the bankruptcy court until May of 1986. Two weeks

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(Cont'd)
agrees that consent to bankruptcy court jurisdiction pursuant to § 157(c)(2) may be implied. *See, In re Daniels-Head & Associates*, 819 F.2d 914 (9th Cir. 1987). This case, also involved an adversary proceeding.

after prevailing on the assumption motion, Sportswear filed an adversary proceeding against Sasson for breach of contract under the licensing agreements. The bankruptcy court awarded Sportswear more than one million dollars in damages in the adversary proceeding which it determined was a core proceeding.

On appeal from the judgment in the adversary proceeding, Sasson raised jurisdictional concerns for the first time. In particular, Sasson contended that Sportswear's adversary proceeding was a noncore proceeding. The Second Circuit disagreed stating, "We are inclined to treat Sportswear's breach of contract action as a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(M)." *Id.* at 1137. The Second Circuit, however, declined to resolve the issue of whether the matter was core or noncore by finding that Sasson had impliedly consented to the bankruptcy court's jurisdiction.

The implied consent found by the Second Circuit is perhaps best explained by Sasson's three year litigation concerning Sportswear's assumption motion. At no time during this contested matter did Sasson challenge the jurisdiction of the bankruptcy court. In fact, the Second Circuit noted, Sasson's jurisdictional protest "more closely resembles an afterthought than a bona fide objection." *Id.* at 1138. As a result, *In re Men's Sportswear* does not necessarily stand for the proposition that a party may impliedly consent to a noncore adversary proceeding. First, the proceeding was core. Second, the consent was implied from the more than three years Sasson litigated the assumption motion which clearly was a core proceeding.

Thus, the disparate holdings of the Second, Sixth, Seventh, Ninth and Eleventh Circuits are not, as the Cain Partnership argues, irreconcilable. The 1987 amendments obviously have made the Sixth and Ninth Circuit holdings of dubious validity as to noncore adversary proceedings. Further, the Second Circuit

holding clearly involved implied consent to a core proceeding. In short, there is no conflict among the circuits which this Court needs to address.

CONCLUSION

Cain Partnership's petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — PETITIONER'S MEMORANDUM IN SUPPORT OF MOTION TO LIFT STAY FILED MAY 25, 1989

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

CASE NO. 389-01058
CHAPTER 11

IN RE:

PIONEER INVESTMENT SERVICES COMPANY,

Debtor-In-Possession.

MOTION OF THE CAIN PARTNERSHIP, LTD. IN SUPPORT OF ITS MOTION TO LIFT THE STAY TO PERMIT MOVANT TO REPOSSESS THE PREMISES FORMERLY DEMISED BY THE COLONIAL ENTERPRISES LEASE AND FOR AN ORDER TO REMOVE DEBTOR-IN-POSSESSION FROM SAID PREMISES

PREFACE

The issue created by the "Motion To Lift The Stay To Permit Movant To Repossess The Premises Formerly Demised By The Colonial Enterprises Lease And For An Order To Remove Debtor-In-Possession From Said Premises" (herinafter "Partnership's Motion") is simple to state, and there exists conclusive authority resolving the issue. The **issue is:** Did the April 11, 1974 lease, as amended, between The Cain Partnership, Ltd. and Colonial Enterprises, Inc. (hereinafter "the Lease") terminate prior to the date (April 12, 1989) on which Debtor filed its petition for relief in the instant case?

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If, as The Cain Partnership, Ltd. (hereinafter "the Partnership") contends, the posited question must be answered in the affirmative, the former leasehold represented by the Lease, to which Debtor was the assignee, is not property of the bankruptcy estate of Debtor. If, as the Partnership also contends, the former leasehold is not property of Debtor's estate, the automatic stay pursuant to Title 11, *United States Code* § 362(a) does not bar the Partnership from regaining possession.

A subsidiary issue involves whether this court has jurisdiction to require Debtor to turn over the formerly demised premises to the Partnership. It is the contention of the Partnership that the court has sufficient jurisdiction over Debtor to require the turnover and that exercise of that jurisdiction is appropriate under the circumstances.

STATUS OF CASE

On April 12, 1989, Pioneer Investment Services Company, Debtor-In-Possession (hereinafter "Debtor") voluntarily filed a Petition for Relief in the instant case. Concomitantly therewith, the automatic stay mandated by Title 11, *United States Code* § 362(a) became effective enjoining claims against or to the estate of Debtor.

The Partnership's Motion, which this memorandum supports, sets out the facts which the Partnership is prepared to prove. To repeat those facts here would be duplicitous. Therefore, the factual presuppositions underlying the remainder of this memorandum are those which appear in and as a part of the Partnership's Motion.

Appendix A

PROCEDURAL APPROPRIATENESS OF INSTANT MOTION

At first blush, there might appear to be a logical inconsistency in the contention by the Partnership that, at the same time, the Lease is not "property" of the estate which is protected by the § 362 automatic stay and that the court should lift the § 362 automatic stay in order to allow the Partnership to obtain possession of it. However, the breadth and penal nature of the automatic stay requires the present procedure. The Partnership is enjoined by the § 362 stay from even giving notice to Debtor to remove itself from the demised premises. This subject has been addressed by case authority in the past.

In particular, the following language is instructive as it appears in *In re: Pagoda International, Inc., Debtor,* 26 B.R. 18 (Bankr. D.Md. 1982) at 20:

> Thus, as pointed out by Pagoda in its brief, it does have a scintilla of equitable interest in the premises. *In Re Andorra Meat Market, Inc.,* 7 B.R. 744, 746 (B.E.D. Pa. 1980). It is this scintilla of interest that triggered the protection of § 362(a). Having the protection in place, it then became incumbent upon the landlord, as it did here, to proceed with this action. *In Re Lewis,* 15 B.R. 643 (B.E.D.Pa. 1981). The situation is not unlike that discussed by Judge Kahn in *Matter of Mimi's of Atlanta, Inc.,* 5 B.R. 623, 627 (B.N.D.Ga. 1980). There, the court noted that even though the leases had been terminated the debtors had a **tenancy by sufferance**.

Bankruptcy Judge William Houston Brown recently

recognized that Tennessee law, likewise, considers such a tenant to be a tenant at sufferance, saying so in *In Re: Memphis-Friday's Associates, Debtor,* 88 B.R. 830 (Bankr. W.D.Tenn. 1988) at 837:

> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. . . . [I]n fact, it has been held that where a lessee remains in possession following default and consequent termination of the lease, the lessee is a **"tenant at sufferance"** of the lessor. *See,* e.g., *In re Maxwell,* 40 B.R. 231, 237 (Bankr. N.D.Ill. 1984); *Metropolitan Life Ins. Co. v. Moore,* 167 Tenn. 620, 72 S.W.2d 1050, 1051 (1934).

Reference directly to the opinion in *Metropolitan Life Ins. Co. v. Moore, supra,* further establishes the proposition saying as follows in 167 Tenn. at 624:

> At common law a mortgagor holding possession "after condition broken" is a "tenant at sufferance" of the mortgagee, according to *Underhill on Landlord and Tenant,* sec. 167; *Fuller v. Wadsworth,* 24 N.C. (2 Ired), 263, 38 Am.Dec., 692; *Ford v. Steele,* 54 Vt., 562.

For more detail with respect to the parameters of rights of a tenant at sufferance is available in 51 C.J.S., *Landlord and Tenant,* p. 779, § 175 et seq. and by reference to the discussion in *Knight v. Haley,* 176 A. 461, 464 (Del. 1934).

One distinction with respect to a tenant at sufferance is that one occupying leased premises as such has neither a legal nor an

equitable interest in the demised premises. *Hughes v. Monnahan,* 282 Minn. 407, 165 N.W.2d 231, 233 (1969). The fact that a debtor which is a tenant at sufferance possesses no interest in the occupied premises which is of any benefit to any creditor of debtor is indicated by the following language from *In re Pagoda International Inc., Debtor, supra,* 26 B.R. at 20:

> The fact that the state processes have not been completed as to Pagoda does not mean that any interest is left other than the common law tenancy at sufferance. In fact, it is not a tenancy, but **permissive occupation.** It **is inalienable** by Pagoda.

In the context of discussing the inalienability of the rights of one tenant by the entirety in Tennessee, this court, twice previously, has found occasion to recognize that whatever interest a debtor in bankruptcy has as a mere tenant by the entirety is inalienable and, because of this, that interest is not part of the bankruptcy estate. *In re Garretson,* 6 B.R. 127 (Bankr. E.D.Tenn. 1980); *In re Dawson,* Debtor, 10 B.R. 680 (Bankr. E.D.Tenn. 1980).

In bankruptcy, the issue of what a debtor possesses as a tenant at sufferance has been many times discussed, and, each time, the result is the same. While the interest might be enough to initially trigger the protection of a § 362(a) automatic stay, it is not enough to allow the right which initially enabled the debtor to occupy previously demised premises to be considered "property" of the bankruptcy estate. *David L. Trask, Trustee in Bankruptcy of Magic Spuds, Inc.,* 376 F.2d 17, 20, 21 (5th Cir. 1967); *In re Maxwell, Jr., Debtor,* 40 B.R. 231, 236, 237, 238 (Bankr. N.D. Ill. 1984); *In re Masterworks, Inc., Debtor,* 94 B.R. 262, 265, 266, 267 (Bankr. D.Conn., 1989); *In re M & R Apparel, Inc.,*

Debtor, 92 B.R. 565, 568, 569 (Bankr. D. Conn 1988); *In re Memphis-Friday's Associates,* 88 B.R. 830, 837, 840, 841, 842, 843 (Bankr. W.D. Tenn. 1988); *In re Ahrens, Debtors,* 64 B.R. 5, 6, 7 (Bankr. E.D.Pa. 1986); *In re Black, Debtor,* 58 B.R. 60, 61, 62 (Bankr. E.D.Pa., 1986); *In the Matter of: Condominium Administrative Services, Inc., Debtor(s),* 55 B.R. 792, 795, 796, 797, 798, 799 (Bankr. M.D.Fla. 1985); *In re Players' Pub, Inc., Debtor,* 45 H.R. 387, 391, 392, 393 (Bankr. D.Mass. 1985); *In re Gray, Debtors,* 37 B.R. 532, 535, 536, 537 (Bankr. N.D.Ga. 1984); *In re Doan's Truck Repair, Inc., Debtor,* 34 B.R. 180, 183) (Bankr. D.Wy. 1983); *In re Foxfire Inn of Stuart Florida, Debtor,* 30 B.R. 30, 31, 32 (Bankr. S.D.Fla. 1983); *In re Pagoda International, Inc., Debtor,* 26 B.R. 18, 20, 21, 22 (Bankr. D.Md. 1982); *Executive Square Office Building v. O'Connor And Associates, Inc.,* 19 B.R. 143, 146, 147, 148, 149 (Bankr. N.D.Fla. 1981); *In re Victory Pipe Craftsmen, Inc., Debtor,* 8 B.R. 635, 636, 637 (Bankr. N.D.Ill., E.D. 1981).

It is generally held that a tenant at sufferance, as a permissive occupant of formerly demised property, has no further entitlement to permissive occupancy after receiving notice from the owner to turnover. In the instant case, the Partnership did not give notice prior to the April 12, 1989 filing of the petition in this case. However, on the present state of the record, the Partnership is automatically enjoined from giving such a notice. But, it is generally conceded that the filing a public proceeding with service on a party to the proceeding is considered notice. Therefore, the Partnership's Motion, under any scheme of things, constitutes permissible notice to Debtor.

Hyper-technicality might dictate that the Partnership be given partial release from the automatic stay to give Debtor notice to quit the formerly demised premises. If Debtor refused to heed

the notice, the Partnership might be required to come back to this court to seek a further partial lifting of the automatic stay to allow the Partnership to commence state court proceedings to oust Debtor. Such a process might be subject to classification as form over substance.

In order for this court to determine whether any lifting of the stay, in response to the Partnership's Motion, is appropriate, it will have to determine whether or not the Lease terminated prior to April 12, 1989, the filing date of Debtor's Chapter 11 petition. That is, if the Lease did not terminate, it constitutes an unexpired lease which Debtor is entitled to affirm or reject provided certain other conditions are met.

Because the Lease will probably constitute a substantial portion of the value reported as property by Debtor, to refer the matter to state court to be resolved, in essence, would amount to turning this entire case over to General Sessions. If this court determined that the Lease was terminated prior to April 12, 1989, for this court to refer the matter to state court for eviction proceedings, likewise, might seem to catapult form over substance. The state court would be bound by the law of the case with respect to the issue of termination and would have nothing more to do than issue writs and occupy the time of the Sheriff when the same might more simply be accomplished by this court.

STATUTORY PROVISIONS IMPLICATED

In pertinent part, Title 11, *United States Code* § 362 provides as follows:

> (a). . . . [a] petition filed . . . operates as a stay, applicable to all entities of —

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* * *

(3) any act to obtain possession of . . . property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(c) . . . (1) the **stay** of an act against property of the estate under subsection (a) of this section **continues until** such property is no longer property of the estate;

* * *

(d) On request of a party in interest and after notice and a hearing, the **court shall grant relief from the stay** provided under subsection (a) of this section, such as by terminating, . . . such stay- . . . (2) with respect to a stay of an act against property under subsection (a) of this section, **if** — (A) the **debtor does not have an equity** in such property; . . . .

In pertinent part, Title 11, *United States Code* § 365(c) states as follows:

The trustee **may not assume** . . . any . . . unexpired **lease** of the debtor, . . ., **if** — . . . (3) such lease is of nonresidential real property and has been **terminated** under applicable nonbankruptcy law **prior to the order for relief.**

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In pertinent part, Title 11, United States Code § 541(b)(2) states as follows:

> Property of the estate does not include — . . . (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under the lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

GOVERNING CASELAW

There are certain governing rules which are universally accepted and which have present application so that mere statement of them is here sufficient. These rules are recognized in an article entitled "The Postpetition, Pre-Rejection, Pre-Assumption Status of An Executory Contract" which appears in 59 *American Bankruptcy Law Journal* 197 (1985). Quotation of the rule with which the Partnership's Motion is most concerned might be helpful. This appears in 59 ABLJ at 201:

> (1) *May the DIP resurrect an executory contract that terminated prior to the filing of the Chapter 11 petition?* (emphasis in original)
>
> * * *
>
> To this question the answer is clearly no. The DIP may not reinstate, revive, or otherwise resurrect a contractual relationship that in fact ended prior

to the date of the filing. In such a case, there is no executory contract for the debtor to assume or reject.[19]

* * *

19. *See*, e.g., *In re Triangle Laboratories, Inc.*, 663 P.2d 463, 467-468 (3rd Cir. 1981) ("An executory contract or lease validly terminated prior to the institution of bankruptcy proceedings is not resurrected by the filing of the petition in bankruptcy, and cannot therefore be included among the debtor's assets."); *In re New Media Irjax, Inc.*, 19 Bankr. 199, 201 (Bankr. M.D.Fla. 1982) ("If the executory contract was effectively cancelled prior to the intervention of bankruptcy, there remains nothing for the Debtor to assume."); *In re Benrus Watch Co. Inc.*, 13 Bankr. 331, 334 (Bankr. S.D.N.Y. 1981) ("Contracts that have been effectively terminated prior to the filing of a chapter 11 petition cannot be revived by the bankruptcy court.").

Whether the contract which the DIP seeks to assume or reject actually expired prior to the date of filing is generally a question of state law, a point recognized by most courts.[20]

* * *

20. *See, Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1212 (7th Cir.), *cert. denied* 105 S.Ct.386 (1984): ("If a contract has been terminated pre-

> bankruptcy, there is nothing left for the debtor to assume. However, the termination must be complete and not subject to reversal, either under the terms of the contract or under state law.") *See also In re Bricker*, 43 Bankr. 344 (Bankr. D. Ariz. 1984).

In recent cases, Judge Lundin has commendably analyzed at what point, under Tennessee law, a **residential** lease expires under the Bankruptcy Code. Of course, an unexpired residential lease is specially protected by Title 11, *United States Code* § 362(b)(10). Under § 362(b)(10), a residential lease can be assumed by a debtor unless, pre-petition, the residential lease has **"expired."**

This is in contrast to the Bankruptcy Code provision with respect to nonresidential real property leases. With respect to **nonresidential** leases, a debtor is prohibited from assuming the benefits or obligations of such a lease if, pre-petition, the lease had **"terminated."** *See* Title 11, *United States Code* § 365(c)(3). Thus, an unexpired, but terminated, nonresidential lease cannot be assumed, post-petition, by a debtor.

Judge Lundin exhaustively concludes that a lease of residential property cannot be considered "expired" under Tennessee law until after execution of a Writ of Possession. *In re Talley*, 69 B.R. 219 (Bankr. M.D.Tenn. 1986); *In re Goodloe*, 61 B.R. 1016 (Bankr. M.D.Tenn. 1986). Of particular interest are the following words of Judge Lundin, quoted from *In re Talley, supra*, 69 B.R. at 223:

> It is doubtful that Congress intended to allow debtors to contract away trustee's power of

> assumption through a lease term which equates a default with "termination." **"Termination," "default" and "expired" are not coextensive;** to allow full equation would thwart the Congressional intent that trustees (and Chapter 13 debtors) may cure defaults for the benefit of the estate pursuant to § 365.

More recently, Bankruptcy Judge Brown has, with equal thoroughness as Judge Lundin, considered when, under Tennessee law, a nonresidential (commercial) lease is "terminated" for the purposes of Title 11, *United States Code* § 365(c)(3). *In re Memphis-Friday's Associates, supra.*

The *Memphis-Friday's* case involved a commercial lease of a restaurant. The debtor attempted to assume the lease after its Chapter 11 petition was filed. The landlord objected and based its objection on the contention that the lease terminated pre-petition. In support of its contention, the landlord established that, pre-petition, landlord gave debtor written notice dated April 18, 1988 that its lease would terminate on April 30, 1988 "due to debtors noncompliance with terms of the written lease." The lease provided a five day cure period for cure on non-payment of rent and a 10 day cure period for other breaches. However, though it was not discussed in the opinion, some of the breached (e.g., failing to obtain permission of the landlord before making repairs) were incurable. By way of background the court stated as follows in the *Memphis-Friday's* case:

> The undisputed evidence in the instant proceeding establishes that the Debtor **closed** its operation and commenced renovations at the restaurant on January 18, 1988. The renovations were

undertaken pursuant to a provision in the Debtor's modified franchise agreement with Friday's, Inc. that it would take steps necessary to conform its restaurant operation to the standards required by the franchisor. . . . At closing, the estimated time for completion of the renovations was two months, while the estimated cost was $250,000.00. The **Debtor failed to satisfy the lease** requirements **that it obtain permission** for renovations from the landlord, provide the landlord with specifications for the work to be done, and submit to the landlord performance and labor and material payment bonds or financial statements exhibiting a sufficient net worth of the Debtor, (citations omitted) . . . [t]he landlord sent notice of such failure, ... (citations omitted) Additionally, on March 1, 1988, the Debtor failed to make its rental payment for that month. Notice . . . with instructions to cure same, was sent and received, via certified mail, on March 16, 1988. (citations omitted)

On March 17, 1988, the Tennessee Department of Employment Security filed a lien against the Debtor's property . . . . (citations omitted) [c]ontractor performing the renovations . . . filed a materialmen's lien . . . . (citations omitted). [T]hese liens are alleged to be in further contravention of the lease.

On April 12, 1988, the Debtor again failed to pay its monthly rental and on April 18, 1988, the landlord sent the Debtor the "notice of Termination and Notice of Additional Defaults"

via certified mail. The notice specifies the above defaults and provides that in light thereof, the "Lease and Term thereof will terminate on April 30, 1988." (citations omitted).

Mr. Victor, an officer of the Debtor, Maruki Tennessee "F," Inc. and of Maruki U.S.A. Co. Inc. testified that he attempted several times to cure the defaults by proposing settlement offers but that the landlord "would not let him pay."

* * *

The equities do not favor this Debtor, . . . [T]he bankruptcy court is a court of equity. *Bank of Marin v. England*, 385 U.S. 99, 103 (1966). 'It is, however, a court of equity under the law.' *In re Costell*, 75 B.R. 348, 353 (Bankr. N.D. Ohio 1987). The equity of the court does not reach to this Debtor, especially in view of the mandate of the Code. 11 U.S.C. Section 365(c)(3). As Justice White recently observed for the unanimous court in *Northwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 968-969 (1988): **'[w]hatever equitable powers remain in the bankruptcy courts must and can only he exercised within the confines of the Bankruptcy Code.'**

* * *

[T]he court concludes that the newer, specific Section 365(c)(3) governs over the older, more general Section 108(b). 'It is a well established

> maxim of statutory interpretation that when Sections of an act can be construed consonantly, the should be so interpreted.' *I.T.T. Small Business Finance Corp. v. Frederigue*, 82 B.R. 4, 6 (E.D. N.Y. 1987), citing, *Sutherland Stat. Const.* Sections 51.01, 51.02 (4th Ed.). However, a consonant reading may not always be possible. In *Bank of Commonwealth v. Bevan*, 13 B.R. 989 (E.D. MI. 1981), the District Court construed Section 108(b) to be more specific than Section 362(a) and thus Section 108(b) limited the automatic stay in that case. Id. at 994. However, in the case of Memphis-Friday's Section 365(c)(3) is more specific and limiting than Section 108(b). In *In re Eldorado, Inc.*, 85 B.R. 555, 557 (Bankr. D. Mont. 1987), the court reasoned that Section 108(b) did not act to extend time for curing of pre-bankruptcy defaults in executionary contracts. This is consistent with the Seventh Circuit in *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1215 (7th Cir. 1984), *cert denied*, 469 U.S. 982, 105 S.Ct. 386. As the *Moody* court observed: 'Section 365 specifically governs the time for curing defaults in executionary contracts, and thus, it controls here.

In the *Memphis-Friday's* case, Judge Brown found that the nonresidential lease there in question was terminated prior to the time when the debtor filed its Chapter 11 petition. Because the enunciation of Tennessee law by Judge Brown is definitive, with respect to the issue at hand, extensive quotation seems appropriate. Particularly, it is said as follows in *In re Memphis-Friday's Associates, supra*, 88 B.R. at 836-837:

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It is argued by the Debtor that, notwithstanding the above events, the lease has not been properly terminated under Tennessee law because termination requires actual re-entry by the landlord, commencement of a suit for possession, or issuance of a writ of possession. For this proposition, the Debtor cites the court to [citations omitted].

Each of these cases is readily distinguishable from the proceeding at bar in the first instance because they involve residential real estate. Unlike the proceeding sub judice, the cases cited by the Debtor involve a determination of when a debtor's leasehold or freehold interest in residential real estate is "expired" or "forfeited" rather than a determination of **when a non-residential lease is "terminated"** for purposes of Section 365(c). Accordingly, these cases stand for the proposition that a freehold interest is not forfeited prior to a foreclosure sale and that a lease is not "expired" prior to the issuance of a writ of possession pursuant to Tennessee law and when, for purposes of Section 365(a) of the *Bankruptcy Code*, the subject property is residential [citations omitted].

* * *

This line of reasoning was reiterated in the 1986 Pizza Pumps of America case, *supra*. There, the Tennessee Court of Appeals was faced with a commercial **lease** which **provided** that **no notice** of default **or opportunity to cure** was required for

> the lessor to treat the lease as forfeited when rental payments were overdue. The Court held that the lease was to be construed as written and as such, the **lessee had "lost all legal interest in the lease by forfeiture in not paying the rent on time."** (citation omitted)
>
> The obvious conclusion to be drawn from these cases is that in Tennessee a commercial lease is to be construed and enforced as written. In addition, these cases clearly illustrate that a commercial lease may be **terminated** by the lessor **regardless of possession.**
>
> * * *
>
> In order to fully assess Debtor's rights under the Code, the court has considered whether the Debtor has complied with Section 365(b)(1). (footnote omitted) To reach this consideration, the court would be required to find that an unexpired lease existed for assumption by the Debtor, and **the court has found and concluded that there is no lease for assumption.**

Reference to *Pizza Pumps of America Inc. v. Krispy Kreme Doughnut Corporation, et al.*, 11 TAM 52-13 (Tenn.App., W.S., October 31, 1986), a copy of which is attached hereto, is helpful. For instance, the Court of Appeals stated as follows:

> Pizza Pumps filed its complaint alleging breach of contract and wrongful eviction on May 23, 1984. The Chancellor dismissed the complaint, and

awarded Krispy Kreme arrearages in rent and taxes, attorney's fees and costs on its countercomplaint.

The essential dispute between the parties is whether the lease, . . ., required that notice of default and opportunity to cure within thirty days be granted when rental payments were overdue. Krispy Kreme interprets the **lease** as allowing **no grace period to cure** a default from non-payment of rent, while **Pizza Pumps insists that it complied in good faith** with the terms of paragraph 15 in **tendering payment to cure.**

* * *

We find that this provision makes it clear that overdue rental payments cannot be extended by granting thirty days to remedy, absent the express written consent of the lessor.

* * *

We **do not doubt** that Vella, the president of **Pizza Pumps, subjectively interpreted the lease in this manner;** however, the written terms of the lease must control: in the absence of fraud or mistake, a contract must be interpreted and enforced as written **even though** it contains terms which may be thought **harsh and unjust.** *Ballard v. North American Life & Casualty Co.*, 667 S.W.2d 79, 82 (Tenn. App. 1983).

* * *

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> **We hold** that the written language of paragraph 15, taken as a whole, must be construed to mean that **no notice** of default **and opportunity to cure is required** when rental payments are overdue. Therefore, the lessor could properly choose its option of treating the lease as forfeited, null, and void upon failure to **pay** rent installments **when due.**
>
> Pizza Pumps urges that **estoppel** by course of dealing, i.e., **by accepting late rental payments in the past,** should prevent Krispy Kreme from revoking its leasehold rights. However, our construction of the lease makes it apparent that Pizza Pumps **lost all legal interest in the lease by forfeiture in not *paying* the rent *on time.* Estoppel** may be urged to protect a right, but it **can never create a right.** *Henry County v. Standard Oil Co.*, 167 Tenn. 485, 71 S.W.2d 683, 684 (1934). (emphasis added)

The rule articulated in the *Memphis-Friday's* case and in the *Pizza Pumps* case is not without historical underpinning. To the contrary, though Judge Brown and Judge Highers found it unnecessary in opinions in *Memphis-Friday's* and *Pizza Pumps* to trace the historical roots dictating the results reached with respect to when the lessees under those commercial leases lost all legal rights deriving from the subject leases, what resulted was simply application of plain vanilla law longstanding and entrenched in Tennessee. The essence of the *Memphis-Friday's* and the *Pizza Pumps* rulings is that a commercial lease is nothing more and nothing less than a contract between the lessor and the lessee. The courts took note of the fact that there were no statutory

provisions which gave special protections to such (non-residential) lease/contracts. Also, at least by implication, the courts essentially proceeded on the assumption that there was no disparity in bargaining power at the inception of the commercial leases which required evening-up in order for the law to provide equal footing to the contracting parties. Therefore, the courts, in *Memphis-Friday's* and *Pizza Pumps*, essentially, applied standard common law contract principles as the means by which to resolve the disputes.

One of those standard common law contract doctrines is known as the first breach. A recent and succinct statement of the rule may be found in *Sage of America Company v. Lucey Boiler Company*, TAM ____ (Tenn.App. W.S. October 9, 1987) perm. app. den. January 25, 1988, where the court states as follows in its slip opinion:

> A party who is determined to be in material breach of a contract has no right to rely on the contract terms. The non-breaching party has no further obligation to perform. (citations omitted). Gerep was therefore justified in terminating the contract.

There could hardly be a more indisputable, universally applicable (at least in Tennessee) and clear rule of law than that, when one party to a contract breaches the terms of the contract, the contract ends. The only thing left, thereafter, is for the parties to the contract to either disengage their affairs and any property theretofore encumbered by the contract or for the parties to make a new decision to continue the relationship created by the contract, which, even if continued precisely as it had been before the termination, in effect, is a new contract made just like the one which was in force previous to termination. *Cummins v. McCoy*,

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22 Tenn.App. 681, 691, 125 S.W.2d 509 (1938); *Santa Barbara Capital Corp. v. World Christian Radio Foundation, Inc.*, 491 S.W.2d 852, 857 (Tenn.App. 1972), *cert denied* March 19, 1973; *W.F. Holt Company v. A & E Electric Company, Inc.*, 665 S.W.2d 772, 730 (Tenn.App. 1983) perm. app. den. January 30, 1984; *Misco, Inc. v. United States Steel Corporation*, 784 F.2d 198, 202 n.2 (6th Cir. 1986); *Mr. Transmission, Div. of International Transtech Corporation v. Yount*, 13 TAM 29-14, 1988 Tenn.App.LEXIS 297 (Tenn.App. May 27, 1988); *Almany v. Nationwide Insurance Co.*, 12 TAM 10-6 (Tenn.App. M.S. January 29, 1987); 17 *AmJur2d* Contracts § 365 p. 807 and 17 *AmJur2d Supp.* pp. 222-223; *Restatement (Second) Contracts* § 237, § 241 (1979). The result reached in *Memphis-Friday's* and *Pizza Pumps* is nothing more than an undazzled application of a rule which is beyond dispute either on the oughtness or the existence level.

There are contracts with specific terms which, when the first breach rule is applied to them, yield a different result than when the same rule is applied to contracts without such provisions. That is, if a contract has as a part of it stated means by which the parties must terminate the contract, the explicit prerequisites of the contract will displace the common law rule which, as a matter of law, terminates the contract upon first breach. For instance, if a contract has a cure provision which requires a stated amount of advanced notice to provide an opportunity for the breaching party to cure the breach, the breach by the breaching party will not terminate the contract. Instead, the contract can be terminated only by the means explicitly set out in the contract. In such contracts, the breach by one party normally effectuates the termination provision and gives opportunity for the non-breaching party to set in motion the termination process; however, the termination itself cannot occur by a mere breach. But, the fact

that the first breach rule has an effect on contracts with provisions setting out the means of termination different from its effect on contracts with such provisions does not lessen the force of the first breach rule when applied to contracts without such explicit terms. *Micro Craft, Inc. v. Jones-Robertson, Inc.*, 10 TAM 14-8 (Tenn.App., W.S. Sitting at Nashville, March 6, 1985).

The Lease has no explicit provisions governing its termination. There is no advance notice requirement nor is there any other opportunity provided for either party to cure a breach. Therefore, termination is effectuated by the explicit common law governing termination of contracts where no explicit contract provision sets out the means by which termination must occur.

In the case of *In re Studebaker's of Fort Lauderdale Ltd.*, 73 B.R. 217 (Bankr. N.D.Fla. 1987), the court was faced with debtor's argument that it retained an equitable interest in a terminated commercial lease by virtue of its continued possession of the demised premises at the time of filing the petition for relief and that it would amount to an **unjust enrichment** to the landlord to prevent the debtor from assuming the lease post-petition. The words of the court are elucidating as follows in *In re Studebaker's of Fort Lauderdale Ltd., supra,* 73 B.R. at 218-220:

> The **debtor, . . ., asserts** that it has an equitable right to possession of the subject premises; that **due to the debtor's improvements of said property, the landlord will be unjustly enriched** if allowed to remain in possession; and that it is ready, willing, and able to tender the full amount owed on the rent arrearage, plus interest, costs, and attorney's fees to the landlord herein . . . . The landlord contests said motion, asserting that the

lease was validly terminated pursuant to state law prior to the debtor's filing . . . .

* * *

[m]any courts have ruled that such bare "hold over" possession by the tenant and/or inconclusive proceedings for repossession by the landlord gives the tenant a slight equitable interest which is property of the estate under § 541 and protected by the filing . . . .

* * *

Under § 365 of the Bankruptcy Code, the equitable considerations applied in the **Fontinbleau** [515 F.2d 913 (5th Cir. 1975)] have been **superseded by** specific statutory language addressing the assumption of leases. **§ 365(c)(3)** provides that: . . . . If the *lease* is thus terminated, as opposed to the tenant being dispossessed of the premises, then the trustee is precluded from assuming it. The presence of a slight equitable interest by virtue of possession of premises by a debtor has no bearing whatsoever on the issue of assumability of an unexpired lease. "Once a lease is terminated prior to the intervention of bankruptcy, the landlord-tenant relationship is gone regardless of the right of possession." (citation omitted).

* * *

Accordingly, the debtor had no interest in the lease

or the leasehold premises to be included as property of the estate under § 541 when this case was filed.

LEASE TERMINATION

As quoted on pages 3 and 4 of the Partnership's Motion, the Lease, unequivocally, conditions the right of the lessee to hold the demised premises on the explicitly stated condition that the lessee pay all real property taxes "***promptly when due.***" The Lease has no "ifs," "ands," "buts," or "ors" which in any way provides a caveat or exception with respect to whether or when real property taxes must be paid by the lessee in order for the lessee to preserve its right to hold the premises.

There could be no dispute with respect to the conditionality of the right of the lessee to hold the leased property or that failure to pay the real property taxes *when due* was a breach of the agreed-to condition which the lessee promised the Partnership it would perform at risk of forever losing its right to hold the demised premises.

The Lease has in it not one word which extends to the lessee any right to be notified by the Partnership that it has failed to keep its promise with respect to *promptly* paying the real property taxes *when due*. There are no words of any kind at any place in the Lease from which it could be implied that the Partnership ever undertook the obligation to provide notice to the lessee that, if it failed to keep its promise to pay the real property taxes, *promptly when due,* the Partnership would remind the lessee. Instead, the Partnership and the lessee, in very uncomplicated and abundantly clear language, agreed that the lessee would take full responsibility to pay the real property taxes when due, without prompting by the Partnership, and that the lessee would bear the

full consequences of its failure.

As stated on pages 4, 5 and 6 of the Partnership's Motion, the lessee, in the person of Debtor, allowed over $80,000 in real property taxes to accumulate, due but unpaid, from October 1, 1987 up through and including March 1, 1989.

By May 2, 1989, over $9,000 in interest, court costs and attorney's fees incurred by the taxing authorities in their efforts to collect the due, but unpaid, taxes had accrued and was continuing to accrue on a daily basis. The leased premises were threatened with and encumbered by tax liens because of Debtor's prolonged failure to abide by the condition which it promised to satisfy as an essential prerequisite of its right to possession of the leased premises.

There is no privity of contract between the Partnership and any persons or entities other than Colonial Enterprises, Inc. and its assignees or assignees of its assignees, the latest of which is Debtor. In other words, the Partnership looks to Debtor and to no other person nor entity for payment of the taxes as promised by Colonial Enterprises, Inc.

If persons or entities, in privity with Debtor, have breached agreements obligating such other persons to Debtor with respect to paying taxes, Debtor's remedy for losses suffered because of the termination of the lease is against those obligated to Debtor. None of this alters the fact that the Lease terminated upon failure of the lessee (Debtor) to live up to its promise to pay all real property taxes *promptly when due*. Since the first failure by the lessee (Debtor) to pay real property taxes promptly when due, on October 1, 1987, Debtor has been no more than, at best, a tenant at sufferance of the Partnership. The Partnership intends

to be at sufferance for no longer.

PARCEL 29.04

This section of this Memorandum relates specifically to what is addressed by the second "FOR FURTHER CAUSE" paragraph on page 2 of the Partnership's Motion which this memorandum supports. That is, a 5.71 acre portion of the 95.5 acres originally demised by the Lease (which is now Parcel 29.04 on Map 132) as to which there is (or at least was) a dispute between Debtor and the Partnership with respect to tenancy and occupancy. As stated in the Partnership's Motion, it is the Partnership's position that this 5.71 acres is part of the demised premises occupied and possessed by Debtor. It is (or was) the position of Debtor that this 5.71 acre Parcel 29.04 is not in Debtor's possession because it is not part of the premises demised by the Lease to Debtor. This is presently relevant to the Partnership's Motion because of the Partnership's request that Debtor be ordered to turnover the demised premises.

Debtor is (or at least was) apparently going to resist turnover of that 5.71 acre portion of the demised premises, if for no other reason, on the contention that Debtor did not possess the 5.71 acres to turnover. Dependent on the response of Debtor and other interested persons to the Partnership's Motion, the issue with respect to the 5.71 acres could become germane to an issue as yet not raised and, because this issue might be avoided altogether, it will not be broached here. But, if the issue is subsequently raised, reference back to what is discussed here, because of the turnover issue, will be made.

The Lease has specific language which operates to control whether Debtor possesses the 5.71 acres by virtue of the assignment

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from Premiere Investment Properties, Inc. to Debtor of the Colonial leasehold. The language appears succinctly as follows in enumerated paragraph 1 on page 3 of the Lease:

> This lease may be assigned or the leased premises may be sublet in whole or in part . . . .

As noted above, the Lease has never been amended, explicitly or implicitly, at any time which in any way modifies or allows deviation from the obligations imposed on the Partnership's tenant/lessee by the above-quoted words. Furthermore, the Partnership has never ratified or otherwise consented to any tenant/lessee's deviation from the obligations undertaken by the tenant/lessee as a result of the above-quoted words.

From the Partnership's standpoint, the above-quoted words ensure a vitally important arrangement by which the Partnership intended to be related to the demised property. More specifically, the Partnership never intended to have but one tenant/lessee responsible to the Partnership and to whom/which the Partnership could look for performance of all of the terms of the Lease. If the tenant/lessee of the Partnership chose to have one or a hundred and one subtenants, this was a decision left by the Partnership to the Partnership's tenant/lessee; however, no matter what decision the Partnership's tenant/lessee made with respect to subleasing the demised premises, this would in no way impact the fact that the Partnership would continue to have one responsible party, i.e., the Partnership's tenant/lessee.

The above-quoted language from the Lease allows that Partnership's tenant/lessee flexibility to remove itself from the relationship with the Partnership by replacing itself with ***an*** assignee. However, the Partnership's tenant/lessee could never

replace itself with multiple assignees. This would defeat the entire premise of the Lease by forcing the Partnership into direct relationships with more than one tenant/lessee. The Partnership protected itself from such a situation by the explicit above-quoted language in the Lease. **What is assignable is: "This lease."** What may be "sublet in whole or in part" is the "leased premises." However, "this lease" cannot be assigned "in whole or in part."

Attached to this memorandum as Exhibit A is a copy of a document entitled "ASSIGNMENT OF LEASE" entered into, according to what is said on its face, on February 1, 1984 and which is recorded as Instrument No. 293425 in Book 2094 on pages 077 and 078 which purports to transfer the subject 5.71 acres. It is the position of the Partnership that this document, at best, is a sublease from Colonial to Orange Tee, Inc.

The context is worthy of note. In February 1984, Colonial, since the inception of the Lease on December 11, 1974, had been the one and only tenant/lessee of the Partnership. There had been one, and only one, prior amendment (which is the only amendment there ever has been) to the Lease, and it occurred on April 1, 1977 and gave to Colonial 55 years of extended options and transferred from Colonial its leasehold on 1.65 acres of the 95.5 acres of demised premises.

The attached (Exhibit A hereto) "ASSIGNMENT OF LEASES" is signed by Orvis Milner for and as President of Colonial and by Orvis Milner for and as President of Orange Tee, Inc. The Partnership is not a party to the "ASSIGNMENT OF LEASE" nor has the Partnership affixed any seal or signature to it acknowledging or consenting thereto.

The language of the "ASSIGNMENT OF LEASE" is worthy

of direct quote as follows:

> Whereas, the Assignor (Colonial) is legally in the possession of certain property (further description of the 5.71 acres omitted) . . . which has been **sublet to Omie, Inc.,** under agreement dated August 7, 1978 (further description omitted) . . ., and
>
> Whereas, for good and valuable consideration, . . .paid by Assignee (Orange Tee Inc.) to Assignor (Colonial), the **following described property is hereby assigned from Colonial . . . to the Orange Tee, Inc.** who shall hereinafter stand in the stead and place of Assignor (Colonial) and be entitled to all the rights and which shall assume all obligations attendant to the August 7, 1978 agreement.

Omie, Inc. is not a party to the "ASSIGNMENT OF LEASE" and has not signified any agreement or acquiescence to the document nor its contents. Likewise, Omie, Inc. has never raised any objection; therefore, presumably satisfactory arrangements were made between Omie, Inc. and Orange Tee, Inc. and Colonial.

What Orange Tee, Inc. assumed (i.e., "the following described property") is the sublease from Colonial to Omie, Inc. and that sublease, with its modification, appears in the Knox County, Tennessee Register's Office Book 1840 Page 799 and Book 2071 Page 180. Exhibit A hereto was/is an assignment of a sublease explicitly identified. When the "ASSIGNMENT OF LEASE" (Exhibit A hereto) states that it assigned to Orange Tee, Inc. "the

following described property," it obviously did not convey the 5.71 acres because it did not own the 5.71 acres to convey. The most which Colonial could have assigned is a leasehold right to the 5.71 acres. The leasehold, however, is no broader than the Lease from which it derives. From the language above quoted, it is clear that the Lease limited the leasehold rights of Colonial allowed it to assign the entire Lease and, if Colonial wished to do anything with less than the entire Lease, it could sublet and sublet only.

No person has ever surfaced presenting itself/himself as a tenant/lessee of the 5.71 acres. Had such been the case, the Partnership would have refused to recognize any such purported rights. However, the problem has never presented itself because neither Orange Tee, Inc. nor any other persons has ever represented to the Partnership that it/he was a tenant/lessee of the Partnership. Further, the Partnership has never received any rent from Orange Tee, Inc. for any portion of the demised property.

If Colonial purported to assign to Premiere Investment Properties, Inc. anything less than the entirety of the leasehold represented by the Lease, the assignment was, and remains, a nullity. It is immaterial what the intent of Colonial was and what the intent of Premiere Investment Properties, Inc. was. Again, all Colonial could transfer was its leasehold, and, again, its leasehold is nothing more than what is described by way of rights and obligations in the Lease. Therefore, Colonial either assigned to Premiere Investment Properties, Inc. the entire leasehold evidenced by the Lease covering the entirety of 93.85 acres of demised premises or transferred to Colonial nothing.

The Partnership was not a party, an acquiescer nor a ratifier of the assignment (or now perhaps purported assignment) from

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Colonial to Premiere Investment Properties, Inc., and, consequently, the Partnership is not knowledgeable with respect to the terms of any document evidencing that transaction. The same is true with respect to the assignment (or now, perhaps, purported assignment) of Premiere Investment Properties, Inc. to Pioneer Investment Services Company. The Lease does not require the Partnership's tenant/lessee to secure prior consent or permission of the Partnership in order to assign. The Partnership has presumed the regularity of the assignments and, therefore, presumed that the assignments have been made in accordance with the provisions of the Lease.

If Premiere Investment Properties, Inc. or Pioneer Investment Services Company chose to agree with Colonial, as part of the terms of the assignment from Colonial, to leave in place the sublease to Orange Tee, Inc. evidenced by Exhibit A hereto, this certainly is a permissible bargaining point between Colonial and its assignees and of no interest to the Partnership. If, because of such an agreement between Colonial and its assignees, Debtor and Debtor's predecessor, Premiere Investment Properties, Inc., did not consider themselves to "have" the 5.71 acres because they had placed it beyond their ability to use it and had agreed not to disturb the possession of the subtenants then in possession of the property, this in no way diminished the size of the demised premises by 5.71 acres nor did it relieve Debtor or Premiere Investment Properties, Inc. of its responsibilities to the Partnership with respect to the use of the property and payment of real property taxes on it.

Appendix A

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served upon the following:

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by placing a copy of same in the U.S. Mail, postage prepaid, this 24th day of May 1989.

s/ Larry E. Parrish

No. 91-1625

Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION FOR RESPONDENTS FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION

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Appendix B — Order of the United States Bankruptcy Court for the Western District of Tennessee, Western District in *In re Sav-A-Lot Automotive #2, Inc.* 13a

The Cain Partnership, Ltd. (hereinafter "Partnership") received the brief in opposition (hereinafter "Respondents' Brief") from Fleet National Bank, First National Bank Of Louisville and First Tennessee Bank National Association (hereinafter "Respondents").

REPLY ONE: SEPARATION OF POWERS

Respondents' Brief states as follows at 12:

> The Constitution does not prohibit Congress from allowing bankruptcy courts to determine whether a proceeding is core or noncore. Courts often determine their own jurisdiction. (citation omitted) The decision by the bankruptcy court is appealable. Prior to a decision by the bankruptcy court, a party also has the option of making a motion in district court to withdraw the reference to the bankruptcy court. (citation omitted) . . .
>
> Petitioner's argument that . . . "core" and/or "public rights" is too nebulous for bankruptcy courts . . . does not bear scrutiny. The same argument could be made for other areas of constitutional law such as personal jurisdiction over nonresident defendants. Though it may be a difficult area of law, lower courts make these determinations daily.

What is quoted above is the only response to the question stated in the Petition as follows:

> Is the 28 U.S.C. § 157(b)(3) congressional grant of jurisdiction, to a non-Article III bankruptcy judge, to determine whether it or an Article III

district judge must adjudicate the merits of a proceeding, a violation of Article III of the Constitution?

Respondents' objection hopes the Court, unaware, will indulge an unstated presupposition. That is, bankruptcy courts are to be viewed as if presided over by Article III judges. To say of an Article III judge that he/she has the power to decide which, as between the district judge or the bankruptcy judge has jurisdiction, does not evoke any alarm that the constitutional boundaries of Article III would, thereby, be unlawfully crossed. But, to say, as Congress has, that a non-Article III bankruptcy judge must decide whether to permit the Article III district judge to exercise jurisdiction evokes alarm that Article III would, thereby, be evaded. The error on which Respondents would have the Court act is to presume of bankruptcy courts what, when presumed of courts presided over by Article III judges, would be of no moment.

By 28 U.S.C. § 157(b)(3), Congress has mandated, with respect to all cases referred by a district court to a bankruptcy judge pursuant to 28 U.S.C. § 157(a), that a non-Article III judge be the initial adjudicator of whether an Article III judge has jurisdiction over a proceeding. Neither the bankruptcy judge nor any Article III judge is given a choice about either (1) who will or (2) whether to so adjudicate.

Once a bankruptcy case is referred to a bankruptcy judge the decision as to whether any proceeding therein is "core" or not is *vested* by Congress in the bankruptcy judge, and the district court is without jurisdiction to withdraw this critical decision from the bankruptcy judge. Whether an Article III district judge even gets the opportunity to pass on whether it has jurisdiction over the proceeding is wholly dependent on whether the non-Article

III bankruptcy judge lets the district court.

Unless the non-Article III bankruptcy judge decides that the proceeding is noncore, the Article III district court judge has no say in the matter and, simply, must take a back seat and await adjudication of the merits by the non-Article III bankruptcy judge. The Article III district judge, after a bankruptcy judge decides that a "proceeding," which a litigant has no choice other than to file before the bankruptcy judge, is a "core" proceeding, is reduced to a role of an appeal court only.

Once a district court has referred a *case* to a bankruptcy judge, the district court *may*, but is not required to, withdraw the referral but only "*for cause shown.*" 28 U.S.C. § 157(d). A district court would not have "cause" to withdraw a reference because a bankruptcy judge does that which the bankruptcy judge is mandated by Congress [§ 157(b)(3)] to do.

If the district court never referred the case to a bankruptcy judge, the mandate of § 157(b)(3) would never take effect. However, the instant is a case which was referred. Additionally, by Local Rule (Petition p. 16), the district court below generally refers all bankruptcy cases to the bankruptcy judge. This is the local rule in all districts.

The referral and withdrawal provisions of § 157(a) and (d) are a facade to legitimate that which is, in practice, illegitimate. If district courts made no referrals to bankruptcy judges, the whole bankruptcy system would wither away.

Bankruptcy judges, though they might be helpers of the judiciary, are not within the Judicial Branch. What Congress has set up by § 157(b)(3) is a system whereby a person not within the Judicial Branch makes the determination of whether litigants shall have access to the Judicial Branch. While it is true that every

judge within the Judicial Branch must have jurisdiction to determine whether he/she has jurisdiction, for the Judicial Branch to be preserved as an independent and separate branch of government, the opportunity for judges within the Judicial Branch to pass on whether they have jurisdiction must be reserved for such judges only and alone.

If Congress is constitutionally able to set up a gatekeeper outside the Judicial Branch, *e.g.*, a bankruptcy judge, to determine who may and who may not pass through into the Judicial Branch, the Judicial Branch no longer is a separate and independent branch as must be the case for the structure of our government. *Buckley v. Valeo*, 424 U.S. 1, 120 (1976); *Chadha v. INS*, 634 F.2d 425 (9th Cir. 1980), *aff'd*, ____ U.S. ____, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983). Instead, Congress will have created the way to conquer the judiciary by simply reserving to a person outside the Judicial Branch the decision as to whether the Judicial Branch shall or shall not be given opportunity from case to case, to adjudicate.

Today, bankruptcy courts are presided over by most competent jurists. The Partnership does not argue from a presumption that bankruptcy judges, as human beings, are less able than district judges. It is simply a matter of on which side of the boundary, separating the Judicial Branch from the other Branches, Congress has placed bankruptcy judges which is determinative.

A colloquial illustration may serve better to make the point. It is as if Congress has required the fox to make the initial determination as to whether the fox or the farmer has jurisdiction over the chicken, considering each chicken one at a time. Telling the chickens not to worry because, if the fox decides that the fox has jurisdiction, once the fox is finished, the chicken may appeal to the farmer, is no cure.

If, on appeal to the district court, the non-Article III bankruptcy judge is reversed, the litigant who has been forced to spend himself before a tribunal with no jurisdiction may have yet another appeal to a court of appeals and a petition to the Court before getting back to retry the case before a court with jurisdiction. This is a damage which cannot be reversed by a favorable ruling on appeal. Only a certain percentage of litigants could survive to get a second bite at the cherry.

It certainly is true that an inherent flaw which must be tolerated in our judicial system is that trial judges are apt initially to make erroneous decisions about jurisdiction. However, the minimal requirements of due process dictate that the litigant be given the initial decision concerning jurisdiction by a judge within the Judicial Branch and not by a non-Article III gatekeeper.

REPLY TWO: SIXTH CIRCUIT MANIPULATION

The question (Pet. p. II) involves the bankruptcy court's ruling that the proceeding below was core which the Sixth Circuit, for the first time, declared to be was noncore. Then, proceeding on its noncore rationale, the Sixth Circuit affirmed the judgment below even though the Partnership was never given the opportunity to elect how to litigate, knowledgeable, as anticipated by 28 U.S.C. § 157(c)(2), that the proceeding was noncore.

Pointing out that the Eleventh Circuit, in *In re: Davis*, 899 F.2d 1136 (11th Cir. 1990), had rejected such reasoning, the Partnership explained what the Sixth Circuit did (Pet. pp. 25-27) by gutting what had transpired below but, nonetheless, affirming. This unprecedented approach by the Sixth Circuit is already being emulated. *See In the Matter of: Sabec*, 137 B.R. 659 (Bkrtcy W.D. Mich. February 25, 1992); *In The Matter Of: Holly's Inc.*, 1992 Bankr. LEXIS 617 (W.D. Mich. April 28, 1992).

The Respondents repeatedly insist that, in spite of what the Sixth Circuit said, the proceeding below was core (Respondent's Brief pp. 3, 9, 11).

Respondents, in essence, concede that the Sixth Circuit was wrong. But, Respondents are attempting to cover up for this substantial error.

REPLY THREE: NONCORE

Respondents consider that convincing the Court that the Sixth Circuit agreed with the district court that the proceeding was "core" is critical to the tenets of Respondents' argument. In an effort to make this point, Respondents' Brief (pp .2, 5, 6, 13) repeatedly states that the Sixth Circuit did *not* consider the proceeding noncore.

The two best ways to test the genuineness of this assertion is by reference to the precise words of the Sixth Circuit and how other courts have interpreted those words. The Sixth Circuit stated as follows in its opinion (Pet. App. 113a):

> The Bankruptcy Court and the District Court construed the instant proceeding as a core proceeding. Although the instant proceeding is perhaps more properly characterized as a non-core but related proceeding because of the underlying issue involved, (fn. 3) . . . .
>
> * * *
>
> [fn. 3] Appellant's motion is based on rights which could have been brought in state courts had there been no Title 11 bankruptcy case filed. In other words, the question as to the automatic termination of the lease upon breach did not involve any rights

> of either party granted by virtue of the filing of a Title 11 bankruptcy case. Such a strict reading of "core" is *necessitated* by the Supreme Court's holding in *Marathon* (emphasis added).
>
> * * *
>
> [Pet. App. 114a] The actions of appellant amount to an implied consent to have the Bankruptcy Court hear and determine the *instant noncore proceeding* (emphasis added).
>
> [Pet. App. 115a] [w]e conclude that the Partnership . . . consented to the jurisdiction of the Bankruptcy Court to hear and determine *this noncore* but related proceeding (emphasis added).

On March 10, 1992, in the case of *In re: Sav-A-Lot Automotive # 2, Inc.*, Case No. 92-21165-D(rs), the Bankruptcy Court in Memphis filed a document (Appendix A hereto) saying:

> Since the lease termination issue is strictly governed by state law, the court finds that this is a non-core proceeding. See *In re: Pioneer,* 946 F.2d 445 (6th Cir. 1991).

On the same day, in the same case, the same court stated (Appendix B hereto) as follows:

> This court concedes that on a lease termination issue, the bankruptcy court does not have jurisdiction to enter a final order as it is a non-core proceeding. *Pioneer, supra,* [946 F.2d 445 (6th Cir. 1991)].

In two other cases, the bankruptcy court in Michigan (on

February 25, 1992) and the district court in Michigan (on April 28, 1992) have both relied on the opinion of the Sixth Circuit *sub judice* as authority for what, in substance, reduces the fact that the bankruptcy court undertook decision of issues involving exclusively state law, which the courts conceded might have presented a noncore proceeding, to insignificance. The reason given is *consent to jurisdiction implied by silence,* even if it was a noncore proceeding. These courts cited, as controlling their noncore observations, the below ruling of the Sixth Circuit. *See In The Matter Of: Sabec, supra; In The Matter Of: Holly's Inc., supra.*

REPLY FOUR: MISSTATEMENT OF "MAIN ARGUMENT"

Respondents misstate the Partnership's position by contending that its "main argument is that the referral of core proceedings to non-Article III bankruptcy courts is unconstitutional." (Respondents' Brief pp. 2, 8).

If, by "core," Respondents intend proceedings over which a non-Article III bankruptcy judge is constitutionally empowered to adjudicate, the misstatement is mockery.

If, by "core," Respondents mean merely to refer to the list in 28 U.S.C. § 157(b)(2), there is insufficient definiteness to know what limits Respondents mean the word "core" to have. Section 157(b)(2) says of itself that the list is not exclusive; yet, § 157(b)(2) provides not a hint as to what other proceedings may or may not be core. Therefore, if Respondents intend "core" to be a shorthand reference to § 157(b)(2), the Partnership (nor any other person) could say, in advance, whether an adjudication by the bankruptcy court of issues so referred would or would not be unconstitutional.

If, by "core," Respondents intend to communicate that the attempt by Congress, through § 157(b)(2), to empower non-Article

III bankruptcy judges to adjudicate vying claims, determinable exclusively by state (and no other) law, then, the statement is a fair representation of the Partnership's position.

REPLY FIVE: FORUM SHOPPING IMPLICATIONS

If, as Respondents claim and the Sixth Circuit has held, the only prerequisite to jurisdiction of a tribunal (be it one presided over by an Article III judge or a non-Article III judge) is the consent of the parties and no objection by the tribunal, American jurisprudence has been radically changed.

If the law now is that, so long as the court does not refuse to adjudicate, all that is needed for a court to make a binding judgment is the consent of the parties, irrespective of any statute or other law to the contrary or the citizenship of the parties or the amount in controversy, two Florida (picked at random) residents, who consent to the jurisdiction of a bankruptcy judge in Utah, could file a wrongful death action, one against the other and, if the bankruptcy judge agreed to rule, a binding decree could be entered.

On appeal, if either party raised a question about jurisdiction, the appeals court need only cite the decision of the Sixth Circuit below for the proposition that the consent of the parties preempted the issue.

The consent of the parties would reduce to nothingness prior law announced by the Court and the Sixth Circuit [*Freytag v. Commissioner of Internal Revenue*, 501 U.S. __, 115 L. Ed. 2d 764, 791, 111 S. Ct. __ (1991) (Scalia concurring in part); *Insurance Corp. Of Ireland, Ltd. v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982); *Ambrose v. Welch*, 729 F.2d 1084 (6th Cir. 1984); *Stone v. William Beaumont Hospital*, 782 F.2d 609 (6th Cir. 1986); *California v. LaRue*, 409 U.S. 109 (1972); *American*

Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951); *In re: Rini*, 782 F.2d 603 (6th Cir. 1986)], which has prevailed for decades, teaching that appellate courts are duty bound to raise the issue of jurisdiction and, on finding no jurisdiction, to vacate all that had preceded.

Since the September 19, 1991 opinion of the Sixth Circuit, all of the mechanisms for legitimized forum shopping are now in place. The Sixth Circuit and its district courts, henceforth, are completely incapacitated in what previously was their ability to short circuit any lower court adjudications made without jurisdiction. Now, the Sixth Circuit and its district courts are mandated to turn a deaf ear to any claim of lack of jurisdiction if the party raising the claim on appeal could be found to have consented.

If the consent is not express, the Sixth Circuit has bound itself and its lower courts to search for anything, including silence, which might be interpreted as an implied consent before taking up the merits of any jurisdictional challenge. If the Sixth Circuit or it lower courts detect something which might qualify as implied consent, each, based on the Sixth Circuit's ruling below, would be bound to reject the jurisdictional challenge out of hand.

Respectfully submitted,

LARRY E. PARRISH
Attorney for Petitioner

APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION IN *IN RE SAV-A-LOT AUTOMOTIVE #2, INC.*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Sav-A-Lot Automotive #2, Inc. Case No. 92-21165-D

Debtor. Chapter 11

MEMORANDUM OPINION AND ORDER DENYING MOTION TO LIFT STAY AND FIXING DATE FOR DEBTOR TO FILE DISCLOSURE STATEMENT AND PLAN

This core proceeding[1] came on to be heard on the motion of Grant and Company ("Grant"), landlord and a creditor of the debtor, seeking to have the section 362 automatic stay lifted, or in the alternative for adequate protection. The issue for judicial determination is whether cause exists to lift the automatic stay, where the owner/landlord obtained a judgment for possession of the leased premises in state court and where debtor filed an appeal but failed to post the statutory bond in the amount of one (1) years rent, but filed a petition in bankruptcy before the order became final. There is also an issue as to whether there was an unexpired lease on the petition filing date. The following shall constitute findings of fact and conclusions of law pursuant to 7052.

---

1. 28 U.S.C. § 157(b)(2)(G).

Appendix A

BACKGROUND FACTS

Grant entered into a lease agreement with the debtor, Sav-A-Lot-Automotive #2, ("herein Sav-A-Lot" or "Debtor") on April 1, 1985, for a three (3) year term for premises at 1979 Covington Pike, Memphis, Tennessee, with options for two (2) successive three (3) year terms. On January 23, 1992, in state court, Grant obtained a judgment in the amount of fifty one thousand nine hundred twenty four dollars ($51,924.00), plus court costs and possession. However, debtor filed a petition in bankruptcy before the order became final. Grant avers that debtor was some fifty one thousand one hundred seventy four dollars ($51,174.00) in arrears.

On January 14, 1992, debtor filed a "complaint for damages in the Circuit Court of Shelby County naming among others, Grant and Company as a defendant, seeking to enjoin Grant from pursuing the detainer action and seeking to have Grant"perform its contract in accordance with the course of dealings between the parties."

As a threshold matter, the court must determine whether the automatic stay applies to the subject property; that is, whether there is any protectable interest of the debtor in the lease. At the time of the petition filing an automatic stay goes into effect by operation of law which stays all acts against the debtor and the debtor's property. 11 U.S.C. § 362(a). Further, a bankruptcy estate is created. See 11 U.S.C. § 541. Section 362(a) states in relevant part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay,

applicable to all entities of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the cause under this title; and

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

Appendix A

Thus, both the debtor and the property of the section 541 bankruptcy estate are protected from creditor action.

On request of a party in interest and after notice and a hearing, the court may grant relief from the stay for cause, including lack of adequate protection. See 1 1 U.S.C. § 362(d)(1). Further, the court may grant relief with respect to property, if such property is not necessary for the debtor's reorganization or there is no equity in the property. See 11 U.S.C. § 362(d)(2).

Thus, creditors may obtain relief from the stay if their interest would be harmed by continuance of the stay. See 11 U.S.C. § 362(d).

Notwithstanding, the automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.

The subject lease was entered into April 1, 1985, by and between the parties. The first term of the lease was to expire in 1988.[2] The lease provided two, three (3) year renewal terms, and set forth the mechanism for renewal.

Paragraph 32 of the lease states:

> "The lessee shall inform the lessor in writing ninety (90) days prior to the termination of this lease of the lessee's intention to renew or not to renew the space on the terms negotiated."

---

2. The lease did not contain a certain date on which the lease would terminate.

Appendix A

An addendum to the lease styled, "Lease Option" was executed and provides, in relevant part:

> At the end of the first three year lease period, the Lessee has the option to extend the lease period for another three years. The rental rate for this period will be $3,935.00 per month. At the end of this three year period, the Lessee has the option of extending the lease for two more three-year periods. The rental rate for each of these two rental terms will be negotiated, upon notification from the Lessee, that he desires to extend the lease. This notification must be given at least ninety days prior to the termination of the preceding lease period. The rental rate negotiated shall be approximately equal to the market rate for equivalent property, but shall not increase at a rate greater than the increase in the United States Government Consumer Price Index over the period of the preceding lease term. For example, if the Consumer Price Index showed an increase of three percent (3%) two percent (2%), and for percent (4%) for each of the preceding three years, then the rental rate could not increase more than nine percent (9%) for the next lease period. All of the terms of the attached lease will be in force during the additional lease periods.

Debtor testified, and it is undisputed that prior to the end of the first term, debtor orally notified the landlord that it wished to extend the lease. No new written lease was executed, but debtor continued in possession of the lease premises, and landlord continued to accept the rents. The rights of the parties under a

lease of real estate are to be determined by state law. See *In the Matter of Zienel Furniture, Inc.*, 13 B.R. 264 (Bankr. E.D. Wis. 1981); *Butner v. U.S.*, 440 U.S. 48 (1979). Under non-bankruptcy law, where lease term expires and tenant remains in possession with the acquiescence of the landlord, it has been held that the lease renews for a like term. Where the lessee enters into possession of property under a lease for one or more years, and continues to remain in possession after the expiration of the lease, with no agreements as to the terms of any renewal of the lease, the law construes the lessee to have leased the property from year to year, and for either party to cancel the tenancy, notice must be given to the other party at least six months before the end of the given year. *Hayes v. Schweikart's Upholstering Co.*, 55 Tenn. App. 442, 402 S.W. 2d 472 (1965). See also *Hibbard v. Newman*, 61 Tenn. (2 Baxt.) 285 (1872); *Spillman v. Walt*, 59 Tenn. (12 Heisk.) 574 (1873); *Glascock v. Marmon*, 4 Tenn. Civ. App. (Higgins) 140 (1914); *Seward v. Garner*, 19 Tenn. App. 440, 89 S.W. 2d 770 (1935). However, other cases have held that a tenancy at will, a periodic tenancy or a tenancy at sufferance is created. *Ladd v. Riggle*, 53 Tenn. (5 Yer.) 113 (1833) (Tenancy may be inferred from the conversations and actions of the parties — an express contract need not be proven). The instant lease provided at paragraph 14 for a holdover tenancy and states in toto:

> Should Lessee remain on the premises after expiration of this lease agreement, *Lessor shall have the option* to interpret such action as creating a month to month lease at a rental twenty percent (20%) higher than that payable for the last month of the lease term or to consider the holding over a default. Only a new signed lease or extension agreement shall deprive Lessor of the choice of action as outlined above. (Emphasis added)

Appendix A

Landlord seeks to treat the tenancy as a holdover tenancy, however, landlord did not avail itself of the provisions of paragraph 14 as landlord did not advise the tenant that the tenancy was being treated as a holdover tenancy. The landlord treated the tenancy according to the terms of the original lease and the court finds that the lease was renewed at the conclusion of the first lease term.

The law in Tennessee regarding the creation of tenancies after holding over beyond a term is set forth in *Tennessee Jurisprudence* which states:

> *Holding over After Termination of Term.* — A tenant holding over after the expiration of the term continues to occupy the relation of tenant towards his former landlord on the same conditions as those of the preceding term, and he may be held strictly liable to another like term at the election of the landlord. Where the tenant holds over after the termination of a lease and the landlord continues to accept the rent, a new tenancy is created, and, if the original tenancy was for a year or more, the new tenancy is from year to year; if the original term was for less than a year, as a month or a quarter, the new tenancy is presumably a periodic tenancy measured by such period.
>
> Generally, when the landlord accepts rent for a period beyond the term, or by other unequivocal act, declaration or agreement recognizes a continuation of the landlord-tenant relationship there is a presumption that he has chosen irrevocably not to treat the tenant as a trespasser,

> but to recognize his continued right of occupancy. In the absence of facts giving rise to an estoppel, if the tenant indicates his intention by remaining in possession after the lease term, and the circumstances appear to indicate an intention of the landlord not to terminate the relationship the burden is upon the landlord to rebut the presumption of intention to extend the lease beyond the term although the presumption is rebuttable.
>
> A parol lease of land is good under the statute of frauds for one year. If the tenant who is under such a contract holds over a portion of the ensuing year, the landlord may elect to treat him as a tenant from year to year, and recover the value of the premises as upon a lease for a single year; and this relation will continue to exist until reasonable notice is given by one of the parties to the other of an intention to terminate the estate. (citations omitted).

17 Tenn. Juris., Landlord Tenant, § 4.

Landlord avers that even if the lease was renewed, the judgment for possession entered by the state court terminates any interest the debtor had in the lease such that there is no protectable interest for the bankruptcy estate. In *In re Illinois Italian Restaurant Corp.*, 42 B.R. 319 (S.D. N.Y. 1984) the debtor corporation operated a restaurant on leased premises. A summary eviction proceeding was commenced against the debtor by the landlord. Judgment was entered in favor of the landlord and a warrant of eviction was served on the debtor. Prior to the execution

of the warrant, debtor filed a petition under chapter 11. The court found that despite the termination of the debtor's legal interest in a lease, the debtor still had an equitable interest which was a part of the bankruptcy estate and protected by the automatic stay. See also, *In re GSVC Restaurant Corp.*, 3 B.R. 491, aff'd 10 B.R. 300 (S.D. N.Y. 1980); *In re Chuck Wagon Bar-B-Que, Inc.*, 7 B.R. 92 (D.D.C. 1982); contra., *In re Richards Pontiac, Inc.*, 54 B.R. 905 (N.D. Ill. 1985).

Since the petition filing occurred before the state court order became final, the judicial proceedings were stayed even though debtor did not post the statutory bond. See *In re Roxse Homes, Inc.*, 74 B.R. 810 (D. Mass. 1987) where the court held that the issuance of a decision by state appellate court in a case that had been fully argued and briefed prepetition was stayed by the filing of a bankruptcy petition. Thus, the appellate decision rendered postpetition was null and void. Debtor's inability to post the bond is only a factor for the bankruptcy court to consider in determining whether or not cause exists to lift the automatic stay.

Based on the foregoing, the court finds that on the petition filing date, since the state court order had not become final, the debtor had interest in the lease and the lease premises which was protected by the automatic stay.

In the bankruptcy court the debtor enjoys the automatic stay and does not have to post the state statutory bond. Debtor has indicated that he wishes to bring the state court matter into the bankruptcy court by the removal powers under 28 U.S.C. § 1452. On the lease termination issue, the bankruptcy court and the state court have concurrent jurisdiction. However, unless the proceeding is core, the bankruptcy court may not enter a final order. The bankruptcy judge shall determine whether a proceeding is core

or non-core, and such determination should not be made solely on the basis that its resolution may be affected by state law. 28 U.S.C. § 157(b)(3). Even if the proceeding is non-core, the bankruptcy judge may still hear the matter but may not enter a final order absent consent of the parties. 28 U.S.C. § 157(C). Since the lease termination issue is strictly governed by state law, the court finds that this is a non-core proceeding. See *In re Pioneer*, 946 F.2d 445 (6th Cir. 1991). The bankruptcy court is a court of equity and this court will fashion an equitable remedy appropriate to this situation.

This court will exercise sua sponte jurisdiction based on a totality of the facts and circumstances and considering comity and respect for state law. 28 U.S.C. § 1334(c)(1). See also *Bellotti v. Baird*, 428 U.S. 132, 143 n.10 (1976).

The bankruptcy court will exercise permissive abstention as follows:

> 1) the bankruptcy court will allow parties to litigate in state court;
>
> 2) the court will not require the debtor to post the bond as required by the state statute since debtor would not be required to post the bond if debtor litigated in the bankruptcy court;
>
> 3) the automatic stay is modified to permit the parties to proceed and defend these actions in state court;
>
> 4) the parties should seek to consolidate the original action (General Sessions) and the

counterclaim (Circuit Court) in one court;

5) debtor should continue to pay the monthly rent pursuant to the lease terms;

6) debtor should keep the necessary insurance on the premises as the lease provides; and

7) within sixty (60) days of this order, the debtor should file a disclosure statement and a summary of a proposed plan which plan proposal may be based on assumptions regarding the state court litigation.

The bankruptcy court reserves determination of the issues related to assumption or rejection under section 365.

CONCLUSION

Based on all of the foregoing and the case record as a whole, the court exercises sua sponte discretionary abstention to allow the debtor and Grant to litigate the original action as appealed and the counterclaim in state court without the requirement of the debtor posting a bond. The court finds that on the petition filing date, the debtor had a leasehold interest which is a part of the section 541 bankruptcy estate.

The motion to lift the automatic stay is denied and the court exercises sua sponte abstention.

IT IS SO ORDERED

Appendix A

s/ Bernice B. Donald
BERNICE B. DONALD, JUDGE
UNITED STATES
BANKRUPTCY COURT
DATE: 3-10-92

cc:

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APPENDIX B — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DISTRICT IN *IN RE SAV-A-LOT AUTOMOTIVE #2, INC.*

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

Sav-A-Lot Automotive #2, Inc. Case No. 92-21165-D

Debtor. Chapter 11

Sav-A-Lot Automotive #2, Inc.,

Plaintiff,

vs. Adversary No. 92-0194

Paul Tashie, Auto Radio, Inc.,
Peter Tashie, and NT Investments, Ltd.,

Defendants.

ORDER DENYING DEBTOR'S MOTION FOR TEMPORARY RESTRAINING ORDER

This cause came on for hearing on the motion of debtor, Sav-A-Lot Automotive #2, Inc., ("Sav-A-Lot") seeking a temporary restraining order ("TRO") on four (4) bases. The court observed that in order for relief to be granted, the movant must prevail under F.R.Civ.P. 65 made applicable to the bankruptcy court by F.R.B.P. 7065. The court heard argument on the motion

for TRO subject to an objection to subject matter jurisdiction made at the outset by defendants. See *In re Pioneer*, 946 F.2d 445 (6th Cir. 1991).

This court concedes that on a lease termination issue, the bankruptcy court does not have jurisdiction to enter a final order as it is a non-core proceeding. *Pioneer, supra*. However, the bankruptcy court makes the determination of what is core and what is non-core. See 28 U.S.C. § 157(b)(3). Even where the bankruptcy court finds that a matter is non-core, the court is not deprived of jurisdiction to hear the matter so long as it arises out of, or is related to the bankruptcy case, the court simply may not enter a final order absent consent of the parties. 11 U.S.C. § 157.

However, because the issues raised in the motion for TRO relate directly to the administration of the bankruptcy estate, the court finds that the proceeding is core. See 28 U.S.C. § 157(b)(2)(A).

The court made oral findings and conclusions on three (3) of the four (4) bases at the conclusion of the hearing and left open only the issue which sought to prohibit defendants from removing the trailer and its contents from their current location.

After considering argument of counsel, evidence in the record, and the case record as a whole, the court finds the automatic stay protects the debtors interest in property no matter where such property is located. 11 U.S.C.§ 362(a). Therefore, NT investments and the Tashies may not exercise control over any property belonging to the debtor without obtaining relief from the bankruptcy court pursuant to 11 U.S.C. § 362(d).

Appendix B

After reviewing the lease assignment, and based on the testimony of the witness, Mr. Tashie, the rights in the trailer are uncertain. Therefore, some determination of those rights must be made. However, until such determination is made, inasmuch as the debtor is claiming the trailer as property of the section 541 bankruptcy estate, the property in the trailer as well as the trailer is protected by the automatic stay and therefore no further injunction is required.

The bankruptcy code at 11 U.S.C. § 362(h) provides for the punitive damages for violation of the automatic stay.

Based on all the foregoing and pursuant to F.R.B.P. 7052, the debtor's motion for temporary restraining order is denied; however, the automatic stay prohibits the exercise or control of the trailer which is deemed property of the bankruptcy estate until some further determination is made.

IT IS SO ORDERED

s/Bernice B. Donald
BERNICE B. DONALD, JUDGE
UNITED STATES
BANKRUPTCY COURT

DATE: 3-10-92

cc:

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Appendix B

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REPLY

BRIEF

(5)

No. 91-1625

Supreme Court, U.S.
FILED
MAY 28 1992
THE CLERK

In The

Supreme Court of the United States

October Term 1991

THE CAIN PARTNERSHIP, LTD.,

Petitioner,

vs.

PIONEER INVESTMENT SERVICES COMPANY; FLEET NATIONAL BANK; FIRST NATIONAL BANK OF LOUISVILLE; FIRST TENNESSEE BANK NATIONAL ASSOCIATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER TO BRIEF IN OPPOSITION FOR RESPONDENT PIONEER INVESTMENT SERVICES COMPANY

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On May 12, 1992, petitioner, The Cain Partnership, Ltd. (hereinafter "Partnership") received the brief in opposition (hereinafter "Debtor's Brief") from Pioneer Investment Services Company (hereinafter "Debtor").

REPLY

At base, what Debtor argues, as well it must, in defense of what occurred below, is set out in Debtor's Brief p. 8. The only real position of Debtor is that Congress has plenary power over bankruptcy matters and whatever Congress wants to do about bankruptcy matters is the business of Congress, and the Judicial Branch ought to stay out of the way. The essence of Debtor's argument is that, if the Court, gets in the way of Congress by imposing other constitutional requirements on the exclusive right of Congress, under Article I § 8, cl. 4, to regulate bankruptcy matters, the Court will have turned one part of the Constitution on the other part of the Constitution, and Congress will no longer be the sole constitutional authority over bankruptcy matters.

According to Debtor, Congress must be given free reign to trample on Article III and the Tenth Amendment so long as it does so under the banner of bankruptcy. The Court has already decided that this, the only real argument of Debtor, is hollow and, therefore, rejected it. *Right v. Union Central Life Insurance,* 304 U.S. 502 (1938), *reh. den.,* 305 U.S. 668 (1939).

In essence, what the courts below have done in the case *sub judice* is buy into the only real argument of Debtor. The result is that, without so stating, Article I § 8 cl. 4 has been used to overrun the protections which Article III and the Tenth Amendment guarantee the Partnership.

Debtor's Brief is a tribute to its authors' advocacy skills in that, when one reads it, the tendency is to back off and admire

it as something with appeal. The fact that it is a collage of *non sequiturs* and irrelevancies is overshadowed by the skill with which the *non sequiturs* and irrelevancies have been stuck together as if on canvas. The thoughts which make up Debtor's Brief are, when studied, not helpful to the Court.

On reading Debtor's Brief, one is impressed with how important Debtor considers it to be to divert the Court's attention from what is before it to something which is of no consequence. The only issue here is whether the courts below mishandled the proceeding initiated by the Partnership's motion to lift the automatic stay. Yet, throughout Debtor's Brief, the "proceeding" which Debtor attempts to cast as the one under review is that initiated by Debtor's 11 U.S.C. § 365(c)(3) motion to assume. This is Debtor's attempt to bootstrap in order to destroy Debtor's strawman.

The hope of Debtor is to create a federal question determinable by federal rule of decision. From this false foundation, Debtor moves to adopt reasoning [Mackabe, *The Federal Magistrate Act of 1979,* 16 Harv. J. Legis. 343, 374-379 (1979); Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U. L. Rev. 1297, 1350-54 (1975); Comment, *An Adjudicative Role For Federal Magistrates in Civil Cases,* 40 U. Chi. L. Rev. 584 (1973); *Wharton-Thomas v. United States,* 721 F.2d 922, 925-926 (3rd. Cir. 1983)] which, at least *sub silentio,* produced the sometimes seemingly anomalous decisions in *United States v. Raddatz,* 447 U.S. 667 (1980); *Peretz v. United States,* 501 U.S. ____, 115 L. Ed 2d 808, 111 S. Ct. ____ (1991).

This approach, but only this approach, permits Debtor to overcome that which otherwise defeats Debtor, *i.e.,* that resolution as to which should prevail as between the vying claims of the Partnership and Debtor is based one hundred percent on nothing other than the common law of Tennessee.

While jurisdiction over whether a debtor will be allowed or denied the opportunity to assume an unexpired lease is a question over which a bankruptcy court most often has jurisdiction, this, too, is not a foregone conclusion. For instance, if the sole determinative question as to whether a debtor will be allowed or denied the opportunity to assume is whether the lease is or is not expired and that question is determinable only and alone by state law, then, there exists a prerequisite issue for determination which the bankruptcy court has no jurisdiction to adjudicate.

This comports with the context below. The objection of the Partnership to Debtor's motion to assume was conditional, *i.e.*, if the Colonial Lease did not expire prepetition, the Partnership had no objection to assumption. Thus, the sole determinative question below was whether the lease had expired prepetition. The error below was that the bankruptcy court took it on itself to adjudicate this prerequisite question.

This is illustrative of how Debtor attempts, by labels, to change the issue presented by the instant petition, into one Debtor needs in order to prevail. Debtor errs in arguing here that all that is needed to change substance is to call the thing something different from what it really is.

For instance, Debtor admits that it is "crucial" (Debtor's Brief pp.20-21), if Debtor is to escape the sure-to-be consequence of the Sixth Circuit, *ex post facto,* conjuring up implied consent to permit the bankruptcy court to adjudicate what was ruled by the Sixth Circuit, *ex post facto,* to be a noncore proceeding. Debtor must first have the Court label the "proceeding" below as one to assume the lease, then, having the benefit of this label, to label it, further, as a "contested matter" instead of an "adversary proceeding." If these parts are so labeled, the argument goes, they can then be used to build the platform on which all that occurred below can be labeled "core." Then Debtor can leave

it to be deduced that the Sixth Circuit erred in its noncore analysis, but say of the error: So what? The Sixth Circuit's opinion, on this construct, just becomes another right decision made for the wrong reason.

The conflict in the circuits over the need for express consent in order for a bankruptcy court to "hear and determine" a noncore proceeding is as real a split as ever there has been, and its adverse impact on the *unified* system of bankruptcy courts could not be more potentially disconcerting.

The Sixth Circuit, by its *ex post facto* (but, to the extent it admits a lack of jurisdiction of the bankruptcy court, right) declaration that the proceeding below was noncore, implicates the requirements under 11 U.S.C. § 157(c)(2) for consent to be effective. Both *In re: Bricknell Investment Corp.*, 922 F.2d 696 (11th Cir. 1991) and *The Home Insurance Company v. Cooper & Cooper, Ltd.*, 899 F.2d 746 (7th Cir. 1989) involved exactly the same statute and exactly the same issue and came to exactly the opposite decision as the Sixth Circuit below. All three cases have been decided since the Court, in 1987, effectuated Bankruptcy Rule 7012(b) and Rule 7008, seemingly, in response to the Ninth Circuit opinion in *In re: Daniels-Head & Associates,* 819 F.2d 914 (9th Cir. 1987) which held that implied consent was enough.

The reason why the Court found need for Bankruptcy Rule 7012(b) and Rule 7008, to combat jurisdiction by ambush [*In re: J.T. Moran Financial Corp.*, 1991 Bankr. LEXIS 34, 21 Bankr. Ct. Dec. (CRR) 330 (Bkrtcy S.D.N.Y. 1991)] which results from cases like *In re: Daniels-Head, supra,* and *In re: Southern Industrial Banking Corp.*, 809 F.2d 329 (6th Cir. 1987) and *In re: Men's Sportswear, Inc.*, 834 F.2d 1134 (2nd Cir. 1987), evidently, is to prevent what occurred below.

That is, not until it was too late to decide which to elect one

from among the options (Pet. pp. 25-26) which the Partnership had, was the Partnership informed of the noncore determination by the Sixth Circuit and, this, in complete contravention of what the Partnership had been previously told by the determinations of the courts below.

Whether the proceedings out of which these situations arise are, technically, "contested matters" or "adversary proceedings" could not be of less importance to the rights at issue. Yet, Debtor deems this distinction "crucial" to its case.

Debtor has attempted to convince the Court that, contrary to the holding of the Sixth Circuit below, the Partnership did not merely consent by implication (by its failure to speak in a different way than it spoke); instead, Debtor claims that the Partnership expressly consented (Debtor's Brief pp. 4, 7-8).

In reply to this insistence, the Partnership would point out that, though Debtor and all of the other respondents have previously briefed this issue in the courts below, neither Debtor nor any other respondent has suggested that what Debtor here contends to be evidence of the Partnership's "express" consent, in fact, evidences same. This is a new-found idea.

The Sixth Circuit had before it the record of the proceedings below and the benefit of vigorous argument of Debtor and the other respondents. The Sixth Circuit, obviously, combed the record in search of any evidence it might find to enable it to reason on the premise that the Partnership *expressly* consented.

On September 19, 1991, the Sixth Circuit initially issued its opinion (Pet. App. V p. 93a) including a conclusion that the Partnership had expressly consented.[1] On October 21, 1991, the

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1. This initial opinion on September 19, 1991 is the only opinion of the (Cont'd)

Sixth Circuit, *sua sponte,* recalled its September 19, 1991 opinion (Pet. App. X p. 104a). On October 28, 1991, the Sixth Circuit amended the September 19, 1991 opinion by withdrawing its conclusion therein with respect to the Partnership "expressly" consenting (Pet. App. Y p. 105a-106a).

The opinion of the Sixth Circuit which the Partnership seeks here to have reviewed is the amended opinion (Pet. App. Z p. 107a) which extracts (after careful review of the record relative to the precise point of "express" consent) a previously reached conclusion that there was express consent.

Also, Debtor ignores that the bankruptcy judge, himself, when considering how to rule on the Partnership's Rule 60(b) post-judgment motion, did not even allude (Pet. App. O p. 77a and App. P p. 78a), indirectly, to any notion that the Partnership had expressly consented. The brief in support of the Partnership's motion for relief from stay (Debtor's Brief p. 4 footnote 1) was freshly before the bankruptcy court. The reason the bankruptcy judge, obviously, did not consider the document posited by Debtor here as evidence of *express* consent to be such evidence is because it is such evidence.

The document on which Debtor places reliance, but which neither the bankruptcy court, the district court nor the Sixth Circuit found to be evidence of *express* consent, bears comment. It (Debtor's Brief p. 4 footnote 1, Debtor's Brief Appendix A p. 1) was filed the exact same day as the motion to lift the stay and well-before there was any response indicating that, when the motion and law supporting it was considered, there would be

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(Cont'd)

Sixth Circuit which is reported in the National Reporter System and appears at 946 F.2d 445; however, this opinion by the Sixth Circuit is outdated by the Sixth Circuit's October 28, 1991 amendment discussed *infra*.

opposition. Thus, at the time the memorandum (Debtor's Brief p. 4, footnote 1; 7-8) was filed, the proceeding initiated by the motion to lift the stay was uncontested.

It is true that there later developed a dispute. It, also, is true, from the previously filed motion to assume, that a dispute was anticipated. But, until a dispute developed (after consideration of the basis for the motion to lift the stay and the authorities), the Partnership did not know, for certain, that there would be opponents who would vie with the Partnership in face of the authority presented by the memorandum.

Also, the motion and memorandum presented changed circumstances which, if Debtor had chosen to take advantage thereof, could have produced a settlement between the Partnership and Debtor, and united them[2] against a common adversary. Therefore, when the memorandum was filed, the Partnership could not know, for sure, that a dispute over whether the lease had terminated prepetition would eventuate.

It is this set of circumstances, well known to the bankruptcy judge and Debtor, which is the context which produced the language referred to in Debtor's Brief p. 4, footnote 1; 7-8. The statement by the Partnership that the bankruptcy court had "sufficient jurisdiction," encouraging the bankruptcy court to exercise "that jurisdiction," is specifically stated to be jurisdiction

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2. Debtor and respondents, Fleet National Bank and First National Bank of Louisville, were parties to an escrow agreement with Valley Fidelity Bank & Trust Company which required Valley Fidelity Bank & Trust Company to use escrow funds on deposit to pay the real property taxes required to be paid by the Colonial Lease. It was the breach by Valley Fidelity Bank & Trust Company of the escrow agreement, by its failure to pay the real property taxes it contracted to pay, which caused the default under the Colonial Lease which was the basis for the motion by the Partnership to lift the stay and repossess the property [Pet. App. A p. 3a ¶ g(1); p. 4a ¶ g(2)-¶ g(6)].

"over Debtor." The language quoted from the Partnership's memorandum specifies the scope of the "sufficient jurisdiction," *i.e.*, "to require the turnover [of the leased premises]." It is absolutely true that the bankruptcy court had such jurisdiction. Debtor had "submitted" [*Langenkamp v. Culp*, ____ U.S. ____, 111 S. Ct. 721, 112 L. Ed. 2d 709, 1991 U.S. LEXIS 271 (Jan. 7, 1991)][3] itself and all that it claimed to be its property to the jurisdiction of the bankruptcy court and to take what Debtor claimed as its property and enter orders to reorganize Debtor.

Also, Debtor listed its claim to the leasehold as an asset of Debtor. Debtor could not claim that the Colonial Lease leasehold was not part of the "property" which 11 U.S.C. § 541 made part of the bankruptcy estate.

Thus, what the Partnership said about the jurisdiction of the bankruptcy court, *i.e.*, that it was "sufficient" to order Debtor to abandon its claim to the property demised by the lease, seems self-evident; yet, the fact that the bankruptcy court has such jurisdiction in no way compromises the position of the Partnership that the bankruptcy court had no jurisdiction to adjudicate concerning what, thereafter, developed into a dispute as to which, between them, had the superior right to immediate possession of the property.

The statement by the Partnership that, for the bankruptcy judge "to refer the matter to state court would be necessary" is in the same context, *i.e.*, because Debtor had submitted itself and what it claimed to be its property to the bankruptcy court for adjudication, a writ of possession from the state court would

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3. Notably, the Court avoided use of the word "consent" at any point in the *Langenkamp* opinion apparently making certain that the opinion could never be cited as authority for the proposition that a bankruptcy court can gain otherwise non-existent jurisdiction by consent.

be unnecessary as the only means by which to dispossess Debtor of its claim.

Because Debtor had assumed the role of trustee over the property, *an order requiring abandonment* by Debtor, even if there existed no vying claims between Debtor and the Partnership was required, *i.e.*, Debtor could not just surrender the property to the Partnership. But, for the bankruptcy court to send the Partnership and Debtor to state court to get a writ of possession, by consent, would have been unnecessary since, there being no dispute, the bankruptcy court would have had all of the jurisdiction necessary to get the property into the hands of the Partnership.

Similarly, the observation (referred to in Debtor's Brief p.4 footnote 1) that the Partnership stated "[I]f this court determined that the Lease was terminated prior to" the date on which Debtor filed its voluntary petition, then, no lease existed must be given meaning in the same context. That is, before the bankruptcy court could justify, in light of the obligation of the bankruptcy court to the creditors, ordering Debtor to abandon its claim of right to the property, it would be necessary for the bankruptcy court to determine that the lease terminated prior to the date on which Debtor filed its petition. However, this determination might well have been made in a context where no dispute was presented.

Once Debtor filed an opposition to the claim of right of the Partnership, it became clear that a non-adjudicated resolution of the dispute could not be accomplished. In this markedly changed context, the jurisdiction of the bankruptcy judge had to be assessed in light of completely different principles of law. Then, mutually inconsistent claims of right were being asserted and were subject to resolution by no means other than plenary adjudication.

What had to be adjudicated was whether what the Partnership advocated concerning the law of Tennessee or what Debtor

advocated concerning the law of Tennessee or something other than what either advocated was the law of Tennessee, concerning leases governed by the law of Tennessee, was, truly, the law of Tennessee.

After it became evident that a dispute existed which had no way of being resolved except by an adjudication concerning what Tennessee law required in the circumstances, the Partnership never expressed itself (nor is there any claim that it did) subject to interpretation or misinterpretation as a statement that the Partnership consented to the bankruptcy court adjudicating the dispute.

Added to this is the fact that the law treats a motion to lift the stay as inherently being a challenge to the subject matter jurisdiction of the bankruptcy court (Pet. p. 26).

Seen in light of the foregoing analysis, it becomes pluperfectly clear why Debtor did not advance what it posits before this Court as evidence of express consent by the Partnership, for the same proposition below. Likewise, it is equally clear why neither the Sixth Circuit nor the district court nor the bankruptcy court ever attributed, as evidence of express consent, the statements argued here by Debtor, to be evidence of express consent. Debtor simply has taken from their context certain statements by the Partnership hoping it would be able to implant those statements in a foreign environment and cause them to take on life which, all concerned below, knew the statements never had.

Respectfully submitted,

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